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PLAYING ON WORDS: JUDGE RICHARD A. POSNER'S APPELLATE OPINIONS, 1981-82—RUMINATIONS ON SEXY JUDICIAL OPINION STYLE DURING AN EXTRAORDINARY ROOKIE SEASON

Robert F. Blomquist*

I. INTRODUCTION

"Style" is a sexy, if ambiguous, concept, which, in many ways, is at the very core of American culture.¹ The American media is obsessed with matters of style. We learn—by way of illustration—of such stylistic concerns as the following potpourri: the predominantly black player union's perception of the 100 percent white owned National Basketball Association's negotiating committee as harboring "bargaining style" that is "disrespectful and provocative;"² whether or not Martha Stewart's "housewife-cum-multimedia-entrepreneur" ideas and products for middle class "polish and elegance" serves to "construct notions of whiteness and middle class heterosexual identity;"³ how Steven Spielberg's film *Saving Private Ryan* purportedly "[r]epresent[s] Hollywood at its high-minded best [in its promotion of] the traditional values of heroism, virtue and patriotic duty with gripping, cinéma-vérité-style battle sequences to make it all seem fresh and up to date;"⁴ the ostensible "essence" of the "Sinatra style" as constituting "his ability, in this world gone increasingly stiff, to remain a symbol of reckless

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1. The word "style" can be both a noun and a verb. As a noun, the chief definitions of "style" include the following: "a distinctive manner of expression (as in writing or speech) (the flowery style of 18th century prose)"; "a particular manner or technique by which something is done, created, or performed (a classical style of dance)"; "a distinctive quality, form, or type of something (the Greek style of architecture)"; "a state of being popular." COLLEGIATE DICTIONARY 504 (Merriam-Webster, Inc. ed., 10th ed. 1998). As a verb, the key definitions of "style" are as follows: "to design, make, or arrange in accord with the prevailing mode"; "to give a particular style to; "to call or designate by an identifying term." *Id.*

2. Selena Roberts & Mike Wise, *Both Sides in N.B.A. Lockout Say Race Complicates Talks*, N.Y. TIMES, Dec. 16, 1998, at A1.

3. *Martha's Vineyard*, WALL ST. J., Nov. 20, 1998, at W17 (quoting an "e-mail message from a University of Toronto graduate student proposing that the Modern Language Association devote a session in its upcoming annual conference to Martha Stewart" to explore such questions).

4. Stephen Holden, *In Summer's Popcorn Season, Appreciating the Champagne*, N.Y. TIMES, Sept. 4, 1998, E1.

independence;⁵ features of President Clinton's controversial crisis management "style" in handling an international standoff with Iraq, which style involved fund-raising trips, golf outings, and "reacting to events rather than shaping them,"⁶ and the reported advice of Manhattan interior decorating gurus for combining "ease . . . while yearning for elegance" by such stylistic techniques as "learn[ing] from the scale, proportions and lines of painting and sculpture, from the character of architecture and the wisdom of other cultures."⁷

Item: We encounter an entire issue of *Civilization Magazine*—published by the Library of Congress—on "The Style Around Us," with guest editor, Bill Blass picking the 20th century's 50 "Most Stylish People."⁸

5. Rick Kogan, *What Would Frank Do?*, CHI. TRIB., May 17, 1998, § 2, at 3. "If there was a high roller—a bit of freewheeling frolic—locked in the heart of everyone, Sinatra had the key." *Id.* See also, Stehan Holden, *Frank Sinatra Dies at 82; Matchless Stylist of Pop*, N.Y. TIMES, May 16, 1998, at A1.

In a series of brilliant conceptual albums, he codified a musical vocabulary of adult relationships with which millions identified. The haunting voice heard on a jukebox in the wee small hours of the morning lamenting the end of a love affair was the same voice that jubilantly invited the world to "come fly with me" to exotic realms in a never-ending party.

....

It was as a singer that he exerted the strongest cultural influence. Following his idol Bing Crosby, who had pioneered the use of the microphone, Sinatra transformed popular singing by infusing lyrics with a personal, intimate point of view that conveyed a steady current of eroticism.

Id.

6. James Bennet, *Clinton in a Crisis: A Question of Style*, N.Y. TIMES, Nov. 20, 1997, at A10.

7. Julie V. Iovine, *With a Nod and a Wink*, N.Y. TIMES, Sept. 18, 1997, at F1 (recommending, among other things, "breaking [the] rules" regarding upholstery and blending the textures of "gossamer curtains and whichwashed blinds, neoclassical wallpaper and [a] rustic washstand," *id.* at F9). See also Michael Pollan, *A Room With Too Much View*, HARPERS, Mar. 1997, at 28 ("[w]henver a window looks out on the street, it tells a story about the social world we inhabit; when its gaze is on the landscape, it usually has something to say about our relationship to nature"); Richard L. Berke, *Bush Brothers Provide Light to Republicans After a Dreary Election*, N.Y. TIMES, Nov. 19, 1998, at A20 (feted as models of "compassionate conservatism," the Governors Bush talked about "the style of governance" of George W. Bush of Texas and the "style of campaigning" of Jeb Bush of Florida).

8. Bill Blass, *Bill Blass's 50 Most Stylish People*, CIVILIZATION, AUG./Sept. 1998, at 82. According to Blass, "[a]ll the people I've selected embody the qualities—allure, movement, wit, boldness, presence, confidence, and undoubtedly, self-invention—that I think sum up that elusive commodity known as style".

Id. Blass's list of the fifty people, along with a brief description, in alphabetical order is as follows:

Gianni Agnelli (Fiat chairman emeritus); Josephine Baker (entertainer); Nina Griscom Baker (food critic, TV personality); Billy Baldwin (interior designer); Cristóbal Balenciaga (couturier); Duke of Beaufort (aristocrat, huntsman); Constance Bennett (actress); Mark Birley (English entrepreneur); Evangeline Bruce (Washington hostess); Coco Chanel (fashion designer); Tina Chow (model); Ina Claire (stage actress); Gary Cooper (actor); Sir Noël Coward (playwright); Marlene Dietrich (entertainer, actress); Mica Ertegun (interior designer); LouLou de la Falaise (fashion muse); Clark Gable (actor); Hubert de Givenchy (fashion designer); Louise Grunwald (New York socialite); C.Z. Guest (garden guru, horsewoman); Gloria Guinness (style personality); Nicky de Gunzburg (fashion sage); Ernest Hemingway (writer, sportsman); Anouska Hempel (hotelier, style arbiter); Audrey Hepburn (actress); Carolina Herrera (fashion designer); Slim Keith (American ideal); Nan

Item: Among the hundreds of books-in-print on the Amazon.com webpage with "style" in the title,⁹ we find the following works, chosen at random: Alain Silver's and James Ursini's *The Noir Style* (1999); Judith Miller's *The Style Sourcebook* (1998); Letitia Baldrige's *In the Kennedy Style* (1998).¹⁰

Item: A professor of dramatic literature at Vassar College fancies himself as a literary style sleuth; the *New York Times* described him as follows:

You are what you write. At least, that's how Donald W. Foster sees it.

Dr. Foster, who is a professor of dramatic literature at Vassar College, made a name for himself in the academic world by persuading many other scholars that a long and disappointingly bland funeral elegy came from the pen of William Shakespeare.

Now he spends his spare moments helping to resolve crimes.

It all started last year after Dr. Foster wrote an article for New York magazine identifying Joe Klein, the journalist, as the anonymous author of "Primary Colors," the political roman à clef.

Since then, law-enforcement officials have sought his help, and he has applied his talents at text analysis to the Unabomb case, the murder of JonBenet Ramsey and a 1996 double murder in Windsor, Connecticut. Usually more at home with songs and sonnets, he is poring over extortion letters, pseudonymous tips and ransom notes. The Federal Bureau of Investigation has asked him to teach agents some of his techniques to unmask authors.

Those techniques include using a computer to see if the authors of two different texts favor the same uncommon words and phrases. Then he compares stylistic mannerisms, looking for parallel patterns in grammar, syntax and sentence structure . . . and ideas and psychological underpinnings.¹¹

Kempner (fashion maven); Serena Linley (British royalty by marriage); Carole Lombard (actress); Mary McFadden (fashion designer); Kitty Miller (social personality); Babe Paley (VOGUE editor and model); Sidney Poitier (actor); Cole Porter (composer and lyricist); Linda Porter (wife of Cole, style icon); Chessy Rayner (interior designer); Eliza Reed (fashion professional); Carolyne Roehm (tastemaker); Millicent Rogers (jewelry designer); Pauline de Rothschild (fashion designer, writer); Bobby Short (entertainer); Tina Turner (singer); Valentina (fashion designer); Gloria Vanderbilt (writer, entrepreneur); Diana Vreeland (fashion empress); Reed Vreeland (husband of Diana); the Duke and Duchess of Windsor (mythic couple).

Id. at 82, 84.

9. Amazon.com search (January 18, 2000) (6,507 books had the word "style" in the title).

10. See also WILHELM WORRINGER, *ABSTRACTION AND EMPATHY: A CONTRIBUTION TO THE PSYCHOLOGY OF STYLE* (1997); DINTY W. MOORE, *THE ACCIDENTAL BUDDHIST: MINDFULNESS, ENLIGHTENMENT, AND SITTING STILL, AMERICAN STYLE* (Main St. Books 1997).

11. Terry Pristin, *From Sonnets to Ransom Notes*, N.Y. TIMES, Nov. 19, 1997, at B1. The article also notes:

Given the American cultural fascination with "style,"¹² it is, perhaps, not surprising that legal scholarly attention should come to focus on the style of appellate judicial opinion writing.¹³ In this regard, the most significant recent intellectual efflorescence on this subject occurred during the Fall of 1995 when the *University of Chicago Law Review* published a special colloquium issue on judicial opinion writing,¹⁴ with contributions by United States Circuit Court Judges Patricia M. Wald¹⁵ and Richard A. Posner,¹⁶ and three full-time members of the professorate: James Boyd White,¹⁷ Frederick Schauer,¹⁸ and Martha C. Nussbaum.¹⁹ Indeed, one of the contributors—Richard A. Posner—has captured considerable national attention and developed a general reputation for his unique judicial opinion writing style as Chief Judge of the United States Court of Appeals for the Seventh Circuit.²⁰

It is up to Dr. Foster to look for idiosyncrasies making up a distinctive pattern. "One can make deliberate errors to try to conceal one's identity," he said, "but it's very hard to abandon one's customary habits." In the case of "Primary Colors," for example, Dr. Foster found that Anonymous and Joe Klein were both fond of compound words, colons and short sentences.

In his criminal work, he also hunts for psychological clues, the aspect of attributional work that he seems to find most engaging. "The person who is being criticized or is under suspicion for committing some sort of serious misdeed," he said, "will on the one hand adopt various strategies for self-justification and various strategies for concealing."

... "Text analysis is now where DNA analysis was a few years ago, or where fingerprinting was 50 years ago," he said. "We're realizing that we can learn an awful lot from evidence of this sort."

Id. at B10.

12. See *supra* notes 1-11 and accompanying text.

13. But see one contrasting example, Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 6, 10 (1998) (discussing "stylistic" features of "a good constitution, which [by its textual language] may well feature a certain kind of good redundancy represented by various clauses that are clarity-enhancing and doubt-removing").

14. See *Special Issue: Judicial Opinion Writing*, 62 U. CHI. L. REV. 1363-1519 (1995). See also WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* (1996) (examination of judicial opinions as literary genre).

15. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter *Rhetoric*]; Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995) [hereinafter *Reply*].

16. See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995).

17. See James Boyd White, *What's An Opinion For?*, 62 U. CHI. L. REV. 1363 (1995).

18. See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

19. See Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477 (1995).

20. Richard A. Posner is an outstanding and prolific intellect—by any measure. As of June 1999, Posner had authored or co-authored an assortment of books including the following: *THE ECONOMICS OF JUSTICE* (1981); *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) (co-authored with William M. Landes); *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); *THE PROBLEMS OF JURISPRUDENCE* (1990); *CARDOZO: A STUDY IN REPUTATION* (1990); *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (Richard A. Posner ed.,

1992); *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); *SEX AND REASON* (1992).

As of June, 1999 Posner had authored or co-authored *hundreds* of "articles, essays and reviews on topics ranging from antitrust to aging, healthcare to homophobia, literature to sex." Alexander Wohl, *Paper Trailblazer*, 83 A.B.A. J. 68 (April 1997). A sample of Posner's less-than-book-length intellectual expression in law journals and other publications is as follows: *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970); *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); *Market Power in Antitrust Cases* (with William M. Landes), 94 HARV. L. REV. 937 (1981); *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); *An Economic Theory of the Criminal Law*, 85 COLUMB. L. REV. 1193 (1985); *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989); *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

Judge Posner has captured attention from other scholars who have devoted considerable words to respond—usually quite critically—to his multitudinous ideas. See, e.g., David Luban, *The Posner Variations* (27 Variations on a Theme by Holmes), 48 STAN. L. REV. 1001 (1996); Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988); David Campbell & Sol Picciotto, *Exploring the Interaction Between Law and Economics: The Limits of Formalism*, 18 LEGAL STUDIES, 249, 255 (1998) ("By dispensing with . . . mathematics, Posner has widened the appeal of the economic gospel, but in doing so he has also removed the inherent check which mathematical modelling places on the miracles that that gospel can claim to have worked.").

Posner has also received lavish attention from the legal media. See, e.g., *Musings of a "Monkey With a Brain,"* NAT'L. L. J. A26 (June 17, 1996); Jeffrey Cole, *Economics of Law: An Interview with Judge Posner*, 22 Litig. 23 (1995).

Practicing lawyers, too, have had a lot to say about Posner-the-Judge. See, e.g., Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 793 (1994). Indeed, extended extracts of this Bar critique are worthy of extensive quotation by way of background to this Article. Important comments, in this regard, include the following:

Richard Posner . . . is a 1962 graduate of Harvard Law School, where he was president of the Harvard Law Review. After clerking for Supreme Court Justice William Brennan . . . Posner spent two years as an assistant to a commissioner of the Federal Trade Commission and another two years as an assistant to Solicitor General Thurgood Marshall. He spent a year at Stanford teaching law before moving to the University of Chicago in 1968, where he was a law professor until 1981. During his tenure at the University of Chicago, Judge Posner became known as a leading exponent of the "law and economics school." . . . In addition to his scholarly activities, he is the co-founder of a highly successful company, Lexecon, Inc., which provides expert witness services to companies and litigants in antitrust matters. President Reagan appointed Judge Posner to the Seventh Circuit in 1981, and he became Chief Judge in September 1993. He continues to teach at the University of Chicago and he remains a prolific writer and lecturer.

Chief Judge Posner is unquestionably one of the most influential legal thinkers in the country. He is a man of high personal integrity; Chief Judge Posner is also a controversial judge. The Council believes the controversy centers primarily around five characteristics of his decision-making. The first is his use of economic theory in decisionmaking [sic], especially concerning traditionally noneconomic issues. The second source of controversy is the report by lawyers that he tends to give short shrift to the facts. His opinions are often attacked by lawyers who feel that he did not take important facts into account, that he ignored facts which would have changed the result had they been acknowledged, or that he simply did not care that much about the actual facts before him. The third criticism is that Chief Judge Posner often looks for ways to modify or overturn settled precedent when he does not care for the outcome that precedent might dictate. Fourth, the Council believes that Chief Judge Posner's opinions could be better structured and that his digressions into dicta should be severely restricted. Fifth, the Council believes that Chief Judge Posner must

The threefold purpose of this Article and related plan of inquiry, is: First, to identify and synthesize the different theoretical views on the meaning and types of appellate judicial opinion writing style emanating from the aforementioned contributors to the *University of Chicago Law Review* special issue on judicial opinion writing;²¹ second, to amplify these extant views (hereinafter "Chicago Law Review Colloquium Views") by identifying and grounding other theoretical characteristics of appellate judicial opinion writing style,²² paying particular attention to the thoughts of a 1996 book on the subject by William Domnarski entitled *In the Opinion of the Court*;²³ and third, to apply these theoretical insights to a selective sample of the published judicial opinions written by Judge Richard A. Posner during 1981-82—his "rookie" season on the federal appellate bench.²⁴ It is my plan to build on the insights gained in this study by publishing future articles that will examine Judge Posner's evolution of his judicial appellate opinion writing style over the course of his judicial career.²⁵

II. A SYNTHESIS AND CRITIQUE OF THE *CHICAGO LAW REVIEW* COLLOQUITUM VIEWS ON JUDICIAL OPINION STYLE

A. *The Judges' Accounts*

1. Judge Wald's View

According to Judge Wald, judges write opinions for seven reasons: (1) to legitimate their authority to say what the law requires litigants to do; (2) to demonstrate consistent and equal application of law to different citizens; (3) the force of tradition; (4) to reveal their intellectual thought processes; (5) to politically rationalize their decisions; (6) for personal gratification; and (7) to attract attention "in hopes of promotion to higher judicial office."²⁶ According to her, "[t]he symbiotic relationship

follow the spirit as well as the letter of [Seventh] Circuit Rule 38 and not continue to impose de facto sanctions in the form of scathing language about the purported inadequacy of attorney performance without notice and a chance to be heard.

Id. at 793, 811-12. See also *infra* notes 172-77 and accompanying text.

21. See *Judicial Opinion Writing*, *supra* note 14; *infra* notes 26-113 and accompanying text.

22. See *infra* notes 114-71 and accompanying text.

23. DOMNARSKI, *supra* note 14.

24. See *infra* notes 172-407 and accompanying text.

25. For example, the tentative title of my next Posnerian style study is as follows: *The Insightful Contrarian: The Dissenting and Concurring Opinions of Judge Richard A. Posner, 1981-2000*.

26. Wald, *Rhetoric*, *supra* note 15, at 1372.

between judicial style and substance must be appraised against all these institutional and personal reasons why judges write, but the quests for credibility and consistency, two goals not always in harmony, are the most critical."²⁷

A particularly valuable insight of Judge Wald regarding appellate judicial writing style is the recent development—"[d]ue to the pressure of accelerating caseloads" at the federal level²⁸—for individual federal circuit judges to exercise their own idiosyncratic approach in deciding whether to write full-blown, publishable opinions for the court or to use "no-opinion dispositions"²⁹—defined as either no written opinion at all or, if written, unpublished in the official court reporters. In Wald's view, such "a double-track system allows for deviousness and abuse,"³⁰ the fallout of a kind of "non-writing" and "non-reasoning" style of appellate judicial opinions—"two different modes of decision making" that Wald differentiates as "rhetorical" and "non-rhetorical."³¹ As persuasively explained by Judge Wald:

There is indeed a worrisome "lost horizon" aspect to no-opinion dispositions. Even when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer). That process, more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit or national law. Most judges feel that responsibility keenly; they literally agonize over their published opinions, which sometimes take weeks or even months to bring to term. It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because "it just won't write." But writing to explain a preordained result with no concern for its precedential effect under a self-imposed time constraint of hours is something else entirely, inviting no backward looks or self-doubt. Rhetoric will always be tied to import and permanence, and its absence in unpublished decisions signifies that

27. *Id.* at 1373.

28. *Id.*

29. *Id.* at 1374.

30. *Id.* Wald reports as follows about her recent experience as a Federal Circuit Judge, during the 1990s:

I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, although most will not stay put for long. But what is the alternative?

Id.

31. *Id.* at 1376.

they are the product of a different and much-abbreviated decision-making process.³²

Wald identifies three "[i]nstitutional constraints in the judging process"³³ that put a practical limit on an individual appellate judge's preference for written opinion styles that would reflect that judge's unalloyed vision of comprehensive rationality and justice.³⁴ First, the reality that the drafting of majority opinions is a delicate political and human relations undertaking, precludes the exercise of pure stylistic preference by a judge in choosing relevant rationales, rhetoric, issues, legal doctrines, precedents, authorities, and even linguistic flourishes like literary allusion or humor.³⁵ Second, the writing judge is affected by

32. *Id.* at 1374-75. Wald's important stylistic insight can be usefully compared to e-mail communications over the computer Internet in recent years. Arguably, people composing e-mail messages compose them with less thought and meticulousness than they would compose written correspondence sent by "snail mail" because of psychologically-perceived ephemeral nature and relative lack of import of e-mail.

Judge Wald sees a real danger for "overworked judges [to] be seduced too easily into preferring the easier, nonrhetorical route, especially in close cases." *Id.* at 1376. Moreover, she opines that:

More and more issues are being decided without opinion, almost in arbitral fashion (arbitrators need give no reasons, just bottom lines). Possible alternatives, such as per curiams—short on rhetoric but nonetheless of precedential value and requiring minimally responsible rationales—have been largely bypassed. There ought, in my view, to be periodic overviews of which kinds of cases get sent down one track rather than another. Danger signals include the presence of obviously difficult issues or the predominance of certain kinds of cases (for example § 1983 prisoner cases) on one track, inconsistencies between published and unpublished results and rationales, and widely differing rates of published and unpublished opinions among different judges.

Id.

For Wald,

The law is coming to be defined by the issues and situations the judges [subjectively] decide to write about, not as in the old common law by the accretion of all the results in all the situations actually presented to the judges. If that fault becomes too wide, the ground on which judicial legitimacy rests can be disastrously shaken.

Id. at 1376-77.

33. *Id.* at 1377.

34. In attractive and compelling prose, Judge Wald explains this theoretical, unalloyed vision as follows:

If judges' druthers prevailed, opinion writing would go like this: read briefs, listen to argument, confer with colleagues, do research, organize thoughts and material, begin writing—with a tentative tilt but not a permanent fix toward a particular result. At each step the judge would recanvass her building blocks to make sure they were solid in their own right and locked together in a systematic design. She would go where the facts, logic, and that sense of ultimate rightness—call it conscience, moral compass, or as Justice Holmes did, his "can't helps"—took her. And like a gifted novelist, she would let the characters and the plot take on a life of their own, drawing her along toward one irresistible conclusion. A Platonic guardian, or perhaps a single Chancellor in Equity, might so dispense justice; a modern-day appellate judge cannot.

Id.

35. *See id.* at 1377-79. Interestingly, Wald notes, in this regard, that "[r]hetoric is the hostage of judicial politics . . . [and] minority judges must find their rhetorical outlet mainly in dissents." *Id.* at 1380.

personal relationships on the court in choosing the style of an opinion; sometimes soothing or humorous words are used when describing the past work-product of a respected colleague or ideological ally; other times caustic prose is used to debunk the views of a disfavored colleague or doctrinal foe.³⁶ Third, the pressures of docket volume coupled with human nature lead to stale, "frozen," and "boilerplate" modes of written expression that tend to turn up in an appellate judge's opinions.³⁷

In concluding her thought provoking article, Judge Wald discusses a grab-bag of idiosyncratic opinion writing styles that various appellate judges have adopted to reflect their own personalities. The following examples, drawn from her account, are illustrative: the psychologically-expansive Judge Jerome Frank of the Second Circuit who was wont to make "excursions into other disciplines for insights on legal problems and the sharing of odd and interesting tidbits of information along with spur-of-the-moment witticisms and literary allusions,"³⁸ the caustic and combative Justice Scalia who "uses conceptual phrases sarcastically, always set out in capital letters... [like] 'Powers that Be' and 'Land of the Free,'"³⁹ the resort by some judges to "make plays on words, or engage in double entendres, or sprinkle movie titles throughout their opinions, [in] a game of hide-and-seek [with] the playful reader."⁴⁰

In contradistinction, however, Judge Wald points out that the crafty, strategic appellate writer can subtly "fram[e] the case" by what may be called the style of "spin" by selectively and judiciously "finding" the facts," *id.* at 1386 (original capitalization omitted); "setting the standard of review," *id.* at 1391 (original capitalization omitted); "controlling the principles," *id.* at 1394 (original capitalization omitted); "labeling the product" as a "narrow or broad" holding, *id.* at 1398-99 (original capitalization omitted); "parsing precedent" by expanding or contracting it, bypassing it, contrasting it, downsizing it, or discrediting it, *id.* at 1399 (original capitalization omitted); "defending dicta" by selective analysis of the implications of the cited authorities, *id.* at 1408 (original capitalization omitted); and setting the tone of the opinion (cautious, expansive, confident, etc.), *see id.* at 1412-15.

36. *See id.* at 1380-85. According to Wald, "[r]egular dissenters such as Justice Scalia are particularly prone to [use] stylish stabs." *Id.* at 1383. Moreover, "the judge's [usually symbiotic] relationship to his law clerk(s)" typically results in most appellate judges incorporating "nice phrase[s]" and other stylistic enhancements to a written opinion. *Id.* at 1383, 1385.

37. *Id.* at 1385.

38. *Id.* at 1415. Wald noted, following her description of her former boss, Judge Jerome Frank, "[l]ike Hemingway, other judges write to the bone, abhorring descriptive adjectives; still others delight in injecting exotic language in their opinions, calculated to send readers, including other judges, scurrying to the dictionary. We write what we are, and perhaps, more than others, judges are what they write." *Id.*

39. *Id.* at 1416.

40. *Id.* Another "recent development in judicial style," identified by Judge Wald, is "the trend toward 'natural language' in judicial opinions as opposed to hypertechnical legalistic prose." *Id.* at 1417. She contends that this development is salutary "because it helps avoid pitfalls in judicial thinking." *Id.*

2. Judge Posner's View

Citing and drawing upon his extensive scholarly interest in judges' writing styles,⁴¹ Judge Posner starts his article in the *University of Chicago Law Review* Colloquium by "trying to explain the elusive concept of 'style' and to distinguish it from related concepts," including the concept of "rhetoric."⁴² In this regard, Posner provides an insightful working definition of writing style, in general, as:

[T]he specific written form in which a writer encodes an idea, a "message," that he wants to put across. His tools of communication are, of course, linguistic. But they include not only vocabulary and grammar but also the often tacit principles governing the length and complexity of sentences, the organization of sentences into larger units such as paragraphs, and the level of formality at which to pitch the writing. These tools are used not just to communicate an idea but also to establish a mood or perhaps a sense of the writer's personality.⁴³

Posner continues his analysis by observing that "rhetoric" is broader than "style" since the former involves "a process of reasoning as well as the medium of verbal expression,"⁴⁴ yet, he also points out that "'rhetoric' is narrower than 'style,' because its focus is on persuasion and that is only one function of expression."⁴⁵ For Posner, "style is what is left out by paraphrase"—⁴⁶"the range of options for encoding the paraphrasable content of a writing."⁴⁷ A truly remarkable judicial writing style is "portabl[e]," according to Posner, since it may transcend a particular legal issue discussed in the judicial opinion.⁴⁸ "The sparkling, vivid, memorable opinion is not so chained to the immediate

41. Posner, *supra* note 16, at 1421, n.1 (citing some of his prior writings on judicial writing style: *THE FEDERAL COURTS: CRISIS AND REFORM*, 107-15, 230-36 (1985); *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986); *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*, 281-299 (1988); *CARDOZO: A STUDY IN REPUTATION*, 33-57, 125-43 (1990)).

42. *Id.* at 1421.

43. *Id.* at 1422.

44. *Id.*

45. *Id.* Posner offers the following explanation for this distinction:

A judge might crack a joke in an opinion merely to amuse, or to show off, or to grip the reader's attention and thus make the opinion more likely to be remembered. The joke would affect the style of the opinion but it might not be intended to induce agreement with the outcome—though then again it might, by making the reader more receptive, as with the conventional speaker's opening joke.

Id.

46. *Id.* (internal quotation marks omitted).

47. *Id.* at 1423.

48. *Id.* at 1424.

context of its creation. It can be pulled out and made exemplary of law's abiding concerns."⁴⁹

The second key contribution of Posner's article is to define and differentiate between what he refers to as "the pure and the impure judicial style[s]."⁵⁰ Essentially, Posner sees this dichotomy as a matter of "tone": he notes that "[t]one depends on many things, notably though not only the choice of words and phrases and the decision to embrace or avoid contractions, colloquialisms, humor, and jargon."⁵¹ Moreover, according to Posner, "[t]one is also shaped by the length and structure of sentences,"⁵² as well as the use of headings, subheadings, or footnotes in a judicial opinion (which tend to raise the tone), "technical terms and acronyms" (which tend to raise the tone), "candor, 'straight talking,' and spontaneity" (which tend to lower the tone), among other ways of writing.⁵³ Posner, however, perceives a problem with the negative connotation of "low" tone in judicial opinions since, by way of an example, "judges such as Holmes who have used . . . the 'low' style are by and large the judges who were intimate with high culture, fussy about their style, aristocrats of writing and thought, judicial Coriolanus even."⁵⁴ Accordingly, Posner substitutes what he characterizes as "a parallel contrast"—the distinction between "pure" and "impure" literary styles⁵⁵—first proposed in an essay by the poet

49. *Id.* at 1425.

50. *Id.* at 1426 (capitalization omitted).

51. *Id.* Posner describes his definition of "jargon" as follows:

I do not mean the names of legal doctrines, which could hardly be dispensed with in judicial opinions. I mean turns of phrase characteristic of legal writing but avoided in good writing—such words or phrases as "absent" (when used as a preposition), "implicate" (to mean relate to or invoke, as in "the due process clause implicates privacy concerns"), "ambit," "chilling effect" (to describe the affect of the regulation of speech on the marketplace of ideas and opinions)... "instant" (for present, as in "the instant case"), "facially" (to mean "on its face"), "impeach" (to mean "contradict") . . . "mandate" (as a verb meaning to order or to require), "prong" (to describe one element of a multifactor test or standard), and "progeny" (cases that follow or derive from an earlier case are the earlier case's "progeny"). These usages are eminently avoidable. If they were not, they would not mark a style; styles are optional.

Id.

52. *Id.* at 1427. Posner amplifies this observation by noting:

Suppression of ornamentation and parentheticals, simplicity and brevity, and short sentences and sentence fragments all tend, generally, to "lower" the tone of a writing, to make it more like speech. But the qualification implicit in "generally" is important. The elimination of all ornamentation may impart an impersonal, bureaucratic, and hence formal tone to a writing, while an excess of brevity may lend it an oracular, dogmatic, imperative, and thus, again, a formal tone.

Id.

53. *Id.*

54. *Id.* at 1428.

55. *Id.*

Robert Penn Warren,⁵⁶ and applies it to judicial opinion writing. According to Posner, "pure style" judicial opinions:

tend to be long for what they have to say, solemn, highly polished and artifactual—far removed from the tone of conversation—impersonal . . . and predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion. If we had a judicial laureate, that is how he or she would write. The standard "pure" opinion uses technical legal terms without translation into everyday English, quotes heavily from previous judicial opinions, includes much detail concerning names, times, and places, complies scrupulously with whatever are the current conventions of citation form, avoids any note of levity, conceals the author's personality, prefers familiar and ready-made formulations to novelties, and bows to the current norms of "political correctness" (corresponding to the euphemisms for which the Victorians became notorious) at whatever

56. See *id.* at n.11 (citing ROBERT PENN WARREN, *Pure and Impure Poetry*, in *SELECTED ESSAYS* 3 (1958)). Posner summarizes the application of Warren's literary dichotomy to various figures in the history of literature:

Warren was writing at a time when the most celebrated modern poets, such as Yeats and Eliot, were in self-conscious revolt against the characteristic style of much nineteenth-century Romantic, and particularly, Victorian poetry. Tennyson's poetry, for example, is very refined, like Victorian culture generally—"correct," smooth, polished, sonorous, and proper. He was, after all, the poet laureate of Victoria's England. "Pure" poetry as exemplified by Tennyson avoids "low" subjects and diction, upholds conventional values, expresses conventional emotions, is self-consciously "poetic" and "elevated." As a corollary of all these things, it lacks a certain tang and texture, as well as conversational immediacy. As Warren puts it, "[T]he pure poem tries to be pure by excluding, more or less rigidly, certain elements which might qualify or contradict its original impulse. In other words, the pure poems want to be, and desperately, all of a piece."

Tennyson was a very great poet, but it is possible also to enjoy, or even to prefer, a "rougher," sometimes even bawdy, sometimes startlingly direct, freer-form poetic style, one that is more concrete, more personal, franker, wittier, more intellectual and that has a wider emotional register and range of subject matter and employs a more varied diction, one closer to that of everyday life (to prose, even).

It is the style of Shakespeare, of Donne, and the other "metaphysical" poets, of Byron, and among modern poets of T.S. Eliot . . . Wallace Stevens, Yeats (after 1910 or so), and Auden, to name a few. Warren speaks of "resistances," of "the tension between the rhythm of the poem and the rhythm of speech . . . ; between the formality of the rhythm and the informality of the language; between the particular and the general, the concrete and the abstract; . . . between the beautiful and the ugly; between ideas." Other "New Critics" speak of irony, paradox, complexity, polysomy, ambiguity.

No one . . . considers Shakespeare, and few consider even Eliot, inferior to Tennyson. They are merely different. And it is a difference echoed in judicial opinions. Most judicial opinions are carefully drafted to emphasize the difference between their diction and that of ordinary speech, which is just the sort of difference that poets like Shakespeare, Byron, and Eliot like to blur. Yet no careful reader, making due allowance for differences in linguistic conventions between the nineteenth century and today, will fail to note the personal, direct, and conversational tone of judges like Holmes and Learned Hand, which is so different from the usual tone of judicial opinions.

Id. at 1428-29 (citations omitted).

cost in stilted diction. The familiarity of the pure style makes it invisible to practitioners of the style and to the intended audience of lawyers. But it is not at all a plain or transparent style. Its artificiality is revealed by a comparison with the prose of a nonlawyer dealing with a similar issue—for example, a philosopher writing about intention compared to a judge in a criminal case writing about intention—as well as by a comparison with the less common “impure” style of judicial opinions.⁵⁷

In contrast to “pure style” judicial opinions, Posner observes that:

Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the “professionalizing” devices of the purist writer—the jargon, the solemnity, the high sheen, the impersonality, the piled-up details conveying an attitude of scrupulous exactness, the fondness for truisms, the unembarrassed repetition of obvious propositions, the long quotations from previous cases to demonstrate fidelity to precedent, the euphemisms, and the exaggerated confidence corresponding to the declamatory mode of “pure” poetry.⁵⁸

While Judge Posner is candid enough to admit that his contrast between the “pure” and “impure” styles of judicial opinion writing is

57. *Id.* at 1429-30.

58. *Id.* at 1430 (footnote omitted). Posner continues his description of the “impure style” of judicial opinion writing as follows:

The handful of impure judicial stylists prefer the bolder approach (to critics, brazen) of trying to persuade without using stylistic devices intended to overawe, impress, and intimidate the reader. They like to be conversational, to write as if it were for the ear rather than for the eye. They like to avoid quoting previous decisions so that they can speak with their own tongue—make it new, make it fresh. (Avoidance of the ready-made was an important element of the “wit” that Eliot admired in the metaphysical poets.) They like to be candid and not pretend to know more than they do or to speak with greater confidence than they feel. They eschew unnecessary details, however impressive the piling on of them might be. They like to shun clichés, to be concrete, to entertain; to seem to enjoy writing; to imitate the movement of thought—unfriendly critics call their style “stream of consciousness.” Of the impure stylists we may say, as Warren did of Eliot and other moderns, “they have tried, within the limits of their gifts, to remain faithful to the complexities of the problems with which they are dealing . . . they have refused to take the easy statement as solution”.

Paradoxically, the impure judicial stylists generally take more pains over style than the pure stylists do. Unless one is a particularly gifted writer, it takes much effort to make an opinion seem effortless! The pure style, despite its artificiality, comes more easily to a legally trained person than the impure style. For one of the things that law school and legal practice teach, all unconsciously but not the less effectively for that, is to forget how one wrote before one became a lawyer.

Id. at 1430-31 (footnotes omitted).

"overdone,"⁵⁹ and that many judges—for stylistic as well as rhetorical purposes—mix the approaches, he confidently offers a thumbnail taxonomy of judicial writing styles by noting:

The pure tendency is illustrated in the opinions of Cardozo, Brandeis (especially his majority opinions), Frankfurter, Brennan, and the second Harlan, and is characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today. The pure style is the inveterate style of law review editors, from whose ranks most of the clerks are drawn. On the impure side can be found most opinions of Holmes, Douglas, Black, Jackson, and Learned Hand. In the middle, the most notable opinions may be those of Henry Friendly. Inclusion of Douglas in the list of impure judicial writers should make clear that impure judicial opinion writing is not always superior to pure, any more than all impure poetry is superior to all pure poetry. Cardozo, mostly a purist, was one of the finest judicial writers in our history.⁶⁰

The third important contribution of Posner's article is his elaboration on how the two styles of judicial opinion writing—the impure style and the pure style—relate to what he describes as "two jurisprudential stances": the "formalist" stance on the one hand, and the "pragmatic" stance on the other.⁶¹ Posner argues that pure writing style strongly correlates with formalist content, although he notes, there are exceptions such as Justice Hugo Black who wrote in an impure judicial opinion style in support of formalist-reasoned results and Justice Benjamin Cardozo who wrote in a pure judicial opinion style to justify pragmatic-reasoned outcomes.⁶² Yet, because of such anomalies in interrelations

59. *Id.* at 1431.

60. *Id.* at 1432 (footnote omitted).

61. *Id.* According to Posner's conception:

The formalist firmly believes in right and wrong, truth and falsehood, and believes that the function of a judicial opinion is to demonstrate that the decision is right and true. The pragmatist, while not doubting that right and wrong and true and false have useful roles to play in a variety of "language games," is inclined to doubt that the decision of cases sufficiently finely balanced, or at least nonroutine, to have been appealed to and to require decision by means of a published opinion is consistently one of those games. The pragmatist thinks that what the judge is doing in deciding the nonroutine case is trying to come up with the most reasonable result in the circumstances, with due regard for such systemic constraints on the freewheeling employment of "reason" as the need to maintain continuity with previous decisions and respect the limitations that the language and discernable purposes of constitutional and statutory texts impose on the interpreter.

Id. at 1432-33.

62. *See id.* at 1433: Posner sarcastically observes, in this regard, that "the pure style is an excellent disguise for the shy pragmatist or, for that matter, the willful or partisan judge." *Id.* He also goes on to acidly distinguish a real impure judicial writing style (which is mediated by tangible legal constraints) and an "arch-sentimentalist" or "arch-egoist" judicial writing style, exemplified in Posner's analysis by the

between judicial opinion style and substantive jurisprudential stances, and because "[s]tyle is artifice"⁶³—and can be feigned to convey what a particular judge "thinks an admirable character for a judge to have"⁶⁴—Posner cautions against automatic inference of "a judge's jurisprudential stance from the judge's style without a consideration of both the content and form of the judge's opinions."⁶⁵

An arguably mean-spirited confrontational, and largely unhelpful aspect of Judge Posner's article is his deconstruction of a criminal law opinion written by Judge Wald and his unflattering comparison of that opinion—which he views as written in a pure style that uses formalist reasoning—with an opinion written by Justice Holmes while he was on the Supreme Judicial Court of Massachusetts—which Posner views as written in an impure style that uses pragmatic reasoning.⁶⁶ Judge Wald's reply to Posner⁶⁷ is, likewise, largely unhelpful and obviously defensive.⁶⁸ Perhaps the redeeming value of this academic spat between two of our most distinguished federal appellate judges is to demonstrate that judicial writing style—of whatever stripe—comes freighted with an enormous amount of judicial ego. This insight is both surprising and unsurprising. It is surprising to those of us who might abstractly hope that our life-tenured federal judges would learn how to depersonalize their opinions from their self-identity and self-worth. It is unsurprising, however, in the larger cultural context of Millennial America, standing betwixt the Age of Narcissism and Anxiety and the Age of Celebrity-at-any-Cost. Yet, we should not throw out the wheat with the chaff of the honorable judges' valuable insights on the nature and role of judicial writing style.

opinions of Justice Harry Blackmun, which while departing from professional norms of a pure style judicial opinion, is an "embarrassing" performance consisting of "the unmediated expression of self." *Id.* at 1433-34. Cf. *Resolutions in Tribute to Justice Harry A. Blackmun*, 120 S. Ct. No. 4 Ct. R-1-17 (Dec. 15, 1999).

63. *Id.* at 1436.

64. *Id.*

65. *Id.*

66. See *id.* at 1437-46, where Posner compares and contrasts Judge Wald's opinion in *United States v. Morris*, 977 F.2d 617 (D.C. Cir. 1992), with Justice Holmes' opinion in *Stack v. New York, N.H. & H.R. Co.*, 58 N.E. 686 (Mass. 1900), written before Holmes was appointed to the United States Supreme Court.

67. See *Reply*, *supra* note 15 at 1451.

68. See *id.* at 1451-52, in which Judge Wald expresses her surprise and dismay at the manner in which Judge Posner uses her written opinion:

[This single opinion], apparently consigns me to the fearful rhetorical hell reserved for lazy and untalented "pure" judges whose opinions are notorious for "jargon," "solemnity," "high sheen," "impersonality," "piled-up details," "fondness for truisms," "unembarrassed repetition of obvious propositions," "long quotations from previous cases," "euphemisms," and "exaggerated confidence."

Wow! What has happened to the vaunted Seventh Circuit civility?

Id. (footnote omitted).

B. *The Professors' Accounts*

1. Professor Schauer's View

Professor Frederick Schauer claims that "in law, as in life, dull may sometimes have its uses."⁶⁹ Accordingly, in a contrarian approach, Schauer challenges the conventional wisdom that the contemporary judicial opinion should be viewed as "a legal performance—of a special sort, one in which the features expected in statutes should largely be absent, and in which the features often detrimental to the effective operation of a statute or administrative regulation—literary flare [or literary style], for example—are generally to be encouraged."⁷⁰ Schauer suggests in his article, entitled *Opinions As Rules*, that appellate judicial opinions are not, and should not be viewed, "as consumption items for law professors, as evidence of the creative intelligence of their authors, or as objects of aesthetic pleasure."⁷¹

The analytical foundation of Professor Schauer's assessment of appellate judicial opinions is that the limited functions of judicial opinions are articulating applicable legal rules, clearly and accurately applying the rules to the facts of litigated cases, and in so doing, deciding the merits of the litigants' legal rights while justifying the result in the case to a limited "reading audience" consisting of other judges, lawyers, law professors and law students.⁷² Thus, according to Schauer, "the judicial opinion . . . should serve a function within law quite different from . . . be[ing] accurate reflections of the reasoning processes of their authors, or literary performances to be appreciated like we appreciate a novel, a poem, or even an elegantly written work of nonfiction."⁷³ In Professor Schauer's worldview, therefore, it is okay for judicial opinions to be like statutes (the Securities Act of 1933 or the Internal Revenue Code, for instance) or like administrative regulations (such as Rules of the Occupational Health and Safety Administration published in the *Code of Federal Regulations*). Commentators should not expect fulsome or scintillating or stylistically competent literary performances of legal materials; boring but clear pronouncements of the law is quite appropriate in his view.⁷⁴

69. Schauer, *supra* note 18, at 1475.

70. *Id.* at 1455.

71. *Id.* at 1456.

72. *See id.* at 1456-66.

73. *Id.* at 1456.

74. *See id.* Schauer contends that "the formal and aliterary style of many contemporary judicial

Schauer conceptualizes the writing of appellate judicial opinions as at least part of "a conscious process of rule making"⁷⁵ that can be expected to vary, depending on the case. He writes in support of this contention as follows:

At times it may be appropriate for a court, as with the exact specification in *Miranda v. Arizona*, to delineate exactly what primary actors should do. At other times it may be appropriate to set out only broad standards, either as a way of delegating further specification to other bodies, or as a means of delaying further specification until additional cases arise. And at still other times it may be appropriate to set out neither crisp rules nor open-ended standards, delaying, in classic common law fashion, the entire rule-making process until a richer stock of experience is developed. But my point here is not one about just what kinds of rules the courts should make. It is about the importance of recognizing that judicial rule making is no less important than rule making by other bodies, and no less likely to be constrained and informed by the kinds of considerations we would employ with respect to any other rule-making enterprise.⁷⁶

Schauer concludes his article by arguing that when an appellate judicial opinion is viewed as a rulemaking vehicle, rather than a teaching/scholarship vehicle for legal academics, "[t]his mode of evaluation may often find the literary and the aesthetic distracting, and the imaginative and stylish counterproductive."⁷⁷ By linking up this conclusion with an earlier portion of his text, which discusses his prognosis that "the number of people who actually read judicial opinions is likely decreasing,"⁷⁸ and of those who do "read" the opinions they increasingly use computer-assisted search techniques to read

opinions may be less an object of scorn and more of an indication . . . of the functions that judicial opinions might serve in the actual operation of the law." *Id.*

In contrast, Schauer summarizes the criticisms of modern United States Supreme Court opinions—implicitly the most important appellate judicial opinions in American society—as focused on the court's "employing excess[ive] doctrinal and discursive complexity," *id.* at 1459, through such devices as multi-part balancing tests, footnotes, prongs, requirements and standards, *see id.* at 1456-59; as masking close "policy and political discretion", *id.* at 1458; and as producing stylistically deficient pieces of literature that are

less memorable, less quotable, less followable, and less teachable than the best work of a Holmes, a Hand, or a Cardozo, all of whom had the ability to write with great style—to produce the kind of opinion that is a pleasure to read, that is evocative and suggestive at numerous layers of subtlety, and that employs phrases that are at once insightful, persuasive, and memorable.

Id. at 1459.

75. *Id.* at 1470.

76. *Id.* at 1470-71 (footnote omitted).

77. *Id.* at 1475.

78. *Id.* at 1471-72.

"chunks" of the opinion to find "quotable language,"⁷⁹ Professor Schauer apparently would prefer appellate judges (and, of course, their law clerks—the real authors of most of the judicial opinions) to write their opinions in the form of "headnotes" compiled by law book publishers.

Professor Schauer's article, however, is unhelpful for a number of reasons. First, despite his elaborate attempt to reconceptualize appellate judicial opinions as mere rule-pronouncements, he still assumes that style matters in theory. The rub, he argues, is that the public does not typically have access to or read appellate judicial opinions, and lawyers are more interested in bits and pieces of opinions rather than a coherent whole. Second, and related to the first point, Schauer does not define judicial style, nor does he provide any clear examples of good style/poor substance, poor style/good substance, or the like. Rather, he implicitly—and without elaboration—seems to equate "style" with mere unnecessary ornamentation—as if all judicial opinion style could be characterized by Baroque and Rococo decorative conventions, which are curious, expansive, excessive, extravagant, and irregular.⁸⁰ Third, Schauer's approach fails to appreciate, or underappreciates, stylistic variations between different statutes and different administrative regulations—some of which are better-crafted, more elegant, and clearer than other statutes and regulations. Fourth, he seemingly dismisses the social value of aesthetically pleasing legal materials—whether they be appellate judicial opinions, statutes or administrative regulations—and the plausible connection between good style in legal materials and good legal outcomes. In a word, Professor Schauer's discussion is naive. In another word, his discussion is superficial.

In contrast to Professor Schauer's unhelpful approach to judicial opinion style, Professor James Boyd White's brief, but rich, article, *What's An Opinion For?*⁸¹ is most illuminating.

79. *Id.* at 1472.

80. See, e.g., GERMAIN BAZIN, *BAROQUE AND ROCOCO* 6-7 (1964).

The Baroque artist . . . longs to enter into the multiplicity of phenomenon, into the flux of things in their perpetual becoming—his compositions are dynamic and open and tend to expand outside their boundaries . . . The Baroque artist's instinct for escape drives him to prefer 'forms that take flight' to those that are static and dense . . .

Id.

81. White, *supra* note 17, at 1363.

2. Professor White's View

Professor James Boyd White is no stranger to the powerful linkages between law and language. As the Hartright Professor of Law and Professor of English at the University of Michigan, he has written extensively on law, literature and literary style.⁸² White makes several important points about the overarching question of the *University of Chicago Law Review* colloquium: "whether it matters how judicial opinions are written, and if so why."⁸³

First, and foremost, Professor White reasons that "[t]he judicial opinion is a claim of meaning"⁸⁴ that is vitally important to what he metaphorically characterizes as "the central conversation that is for us the law."⁸⁵ White's explanation in this regard is worthy of full quotation:

The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and *in the process it connects the case with earlier cases, the particular facts with more general concerns. It translates the experience of the parties, and the language in which they naturally speak of it, into the language of the law, which connects cases across time and space; and it translates the texts of the law—the statutes and opinions and constitutional provisions—into the terms defined by the facts of the present case.* The opinion thus engages in the central conversation that is for us the law, a conversation that the opinion itself makes possible. In doing these things it makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works.⁸⁶

Second, White asserts that judicial performance in opinion writing—say, establishing the facts or interpreting authoritative texts or in construing legal meaning—"can be done well or badly in virtually every dimension."⁸⁷ This, in turn, leads to Professor White's third important point: bad judicial opinions tend to trivialize the law; well-crafted judicial opinions have the potential to dignify the law.⁸⁸

82. See, e.g., JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

83. White, *supra* note 17, at 1363.

84. *Id.* at 1367.

85. *Id.* at 1367-68.

86. *Id.* (Emphasis added).

87. *Id.* at 1368.

88. See *id.* Indeed, according to White, a well-constructed judicial opinion "may even be touched with nobility." *Id.*

A fourth important argument articulated by Professor White in his article is that robust criticism of judicial opinions—on multiple levels including logic, politics and morals—“is an essential part of the activity of law [since] [i]t is crucial to legal practice, for it is on the basis of such criticism that one will argue for or against the continued authority of a particular opinion or line of opinions.”⁸⁹

Professor White ends his short think piece on the significance of judicial opinion writing by postulating that opinion style, or reasoning style, is linked with legal results in cases because “the right ‘style’ or the right mode of reasoning will over time lead to the best results.”⁹⁰ This is so, White asserts, not because there is an automatic connection between opinion style and case results, but rather “through the ways in which the imaginations, minds, and feelings of those who live with the law are affected.”⁹¹

3. Professor Nussbaum’s View

Professor Martha C. Nussbaum brings to the study of law an intimate and refined sense of the power of literature as a shaping force of human culture. In a cornucopia of recent books she has, by way of illustration, explored the relationship between literature and moral philosophy,⁹² meditated on the meaning of a liberal education—with necessary perspectives of ethics, race, sexuality and religion melded with a “narrative imagination”—in understanding the modern meaning of law within a socially-ordered community,⁹³ and examined how an imaginative bent of mind, derived from reading literature, is an essential ingredient in just public discourse within a democratic society.⁹⁴

89. *Id.* As White observes in this regard: “The opinion is not merely an epiphenomenon to the law, a slight adjunct to the real business of deciding cases and predicting what officials will do, but is central to the activities of mind and character of the law as we know and value it”. *Id.*

90. *Id.* at 1369.

91. *Id.* White expands his thought by observing:

[T]he great question of the day is whether law will move in the direction of trivializing human experience, and itself, or in the direction of dignifying itself and that experience. This is in large measure a function of the ways in which the minds that work in this field manifest themselves. The deepest sources of meaning and dignity in human life are activities of love and art; properly understood, the law cannot only enable them, it can be one of them, an activity fully worthy of the human mind and spirit.

Id.

92. See MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

93. See MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* (1997).

94. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995).

In the course of her written contribution to the Chicago Law Review Colloquium, Professor Nussbaum explores the intuitively unlikely metaphor of "poets as judges" in discussing what she terms "judicial rhetoric and the literary imagination."⁹⁵ She articulates a number of fascinating observations about judicial opinion writing style.

Initially, deriving insight from a statement from Justice Stephen G. Breyer during his United States Senate Confirmation Hearings to be an Associate Justice of the United States Supreme Court,⁹⁶ Professor Nussbaum sculpts an underlying attitude of a hypothetical appellate court judge who would be inclined to write a good opinion: "[t]he ability to think of people's lives in the novelist's way is, . . . an important part of the equipment of a judge—not the whole, or even the central part, but a vital part nonetheless."⁹⁷ What Nussbaum means by this hypothetical underlying judicial attitude is informed by the discussion, earlier in her article, of what she calls "[t]he literary judge/judicious spectator,"⁹⁸ learning to "think like a novel-reader,"⁹⁹ and her conception, borrowed by Walt Whitman, of a "poet-judge," the latter being someone with "the ability to imagine vividly and then to assess judicially another person's pain, to participate in it and then to ask about its significance . . . [leading] to acquire a motivation to alter [it]."¹⁰⁰ Second, aligning herself with the Confirmation Hearing thoughts of Justice Breyer,¹⁰¹ Professor Nussbaum's model of a judge

95. Martha C. Nussbaum, *supra* note 19, at 1477 (capitalization omitted). As Professor Nussbaum notes, her "essay is a version of the final chapter of *Poetic Justice: The Literary Imagination in Public Life* [*supra* note 94]." *Id.* at n.†.

96. See *id.* (quoting from the Confirmation Hearings for Stephen G. Breyer to be an Associate Justice of the United States Supreme Court, Senate Committee on the Judiciary, 103d Cong., 2d Sess. 89 (July 13, 1994)). The quote by, now, Justice Breyer is as follows:

I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontes, . . . or *Jane Eyre* that she wrote. He said that if you want to know what that is like, you go and you look out at the city—I think he was looking at London—and he said, you know, you see all those houses now, even at the end of the 19th century, and they all look all as if they're the same. And you think all of those people are out there, going to work, and they're all the same. But, he says, what Bronte tells you is that they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book.

So sometimes I have found literature very helpful as a way out of the tower.

Id.

97. *Id.* at 1496 (footnote omitted).

98. *Id.* at 1486.

99. *Id.* at 1492.

100. *Id.* at 1487-88.

101. See *supra* note 96 and accompanying text.

who is psychologically and emotionally prepared to write a good appellate opinion is one who "stresses the need for technical mastery as well as sentiment and imagination, and [who] insists that the latter must continually be informed by and tethered to the former."¹⁰²

Third, in examining two appellate court opinions—a partial concurrence and partial dissent by United States Supreme Court Justice Stevens in the 1984 prisoners' rights case, *Hudson v. Palmer*,¹⁰³ and a United States Court of Appeals panel majority opinion by Seventh Circuit Judge Richard Posner in a 1994 sexual harassment case, *Carr v. Allison Gas Turbine Division, General Motors Corp.*¹⁰⁴—Professor Nussbaum extolls the stylistic virtues of these opinions.¹⁰⁵ Nussbaum discerns in both opinions the use of imagination and appropriate emotion by the jurists.¹⁰⁶ In both the Stevens and Posner opinions she uncovers a "literary approach [that] is closely connected with sympathetic attention to the special plight of people who are socially unequal,"¹⁰⁷ like a prisoner in his cell and a woman in an overwhelmingly male and hostile workplace.

Fourth, Professor Nussbaum explains a negative exemplar of judicial style in her stylistic analysis of both the majority opinion and concurring opinion by Chief Justice Burger in the 1986 sodomy prosecution case of *Bowers v. Hardwick*.¹⁰⁸ In her critique of these opinions she criticizes the "distancing strategy" of both opinions, which do not attempt to tell the story of the defendant Michael Hardwick's pursuit "to live a fully human life" through his expression of homosexuality.¹⁰⁹ Moreover, Nussbaum disagrees with the opinions' "level of generality" in characterizing the purported right at bar as "a right to commit homosexual sodomy," instead of a more focused "right to determine the course of one's own sexual life so long as one does not harm others."¹¹⁰ According to Nussbaum, jurists exercising "literary imagination" style in *Bowers v. Hardwick* would have given "[more] careful attention to history and social context, and an empathetic consideration of the situation of the homosexual in American society."¹¹¹

102. Nussbaum, *supra* note 19, at 1496.

103. 468 U.S. 517, 541 (1984) (Stevens, J., concurring in part and dissenting in part).

104. 32 F.3d 1007 (7th Cir. 1994).

105. See Nussbaum, *supra* note 19, at 1496-1509.

106. See *id.* at 1509.

107. *Id.*

108. 478 U.S. 186 (1986).

109. Nussbaum, *supra* note 19, at 1513.

110. *Id.*

111. *Id.* at 1514.

Finally, Professor Nussbaum ends her set of observations on judicial opinion writing style by using the American poet Walt Whitman's *Song of Myself* as a model of the poetic imagination needed for a judge to write a good judicial opinion.¹¹² According to Nussbaum: "[i]n order to be fully rational a judge must be capable of literary imagining and sympathy. She must educate not only her technical capacities but also her capacity for humanity."¹¹³

III. BEYOND CHICAGO: SOME OTHER PERSPECTIVES ON JUDICIAL OPINION STYLE

A. Domnarski's Assessment

Attorney William Domnarski provides a variety of valuable ideas and insights about appellate judicial opinion style in his 1996 book, *In the Opinion of the Court*.¹¹⁴ Domnarski's analysis is a valuable extension and amplification of 1995 Chicago Law Review Colloquium views discussed in the previous section.¹¹⁵

Initially, Domnarski emphasizes how judicial opinions are "a form of literature" that consists of "communications between [a] court and society."¹¹⁶ In this respect, he emphasizes how judicial opinion style is "a function of court business, dominant [judicial] personalities, and the influence of law clerks."¹¹⁷

Second, Domnarski examines the captivating, but varying, judicial opinion styles and methods of key United States Supreme Court Justices, including Oliver Wendell Holmes,¹¹⁸ Louis Brandeis,¹¹⁹ Benjamin Cardozo,¹²⁰ Hugo Black,¹²¹ William O. Douglas,¹²² Felix Frankfurter,¹²³ and Robert Jackson.¹²⁴ In a related way, he articulates an intriguing "canon" of eleven Supreme Court opinions,¹²⁵ chronologically ranging from the 1819 opinion for the Court by Chief

112. *See id.* at 1517-19.

113. *Id.* at 1519.

114. DOMNARSKI, *supra* note 14.

115. *See supra* notes 26-113 and accompanying text.

116. DOMNARSKI, *supra* note 14, at 2.

117. *Id.*

118. *See id.* at 35-36, 63-64.

119. *See id.* at 63-66.

120. *See id.* at 67.

121. *See id.* at 36-37, 67-69.

122. *See id.* at 38, 67-68.

123. *See id.* at 66-68.

124. *See id.* at 69-70.

125. *See id.* at 75-89.

Justice John Marshall in *McCullough v. Maryland*¹²⁶ to the 1973 opinion for the Court by Justice Harry Blackmun in *Roe v. Wade*.¹²⁷ In constructing his canon, Domnarski uses style as one of six criteria for selection¹²⁸ and points out that stylistically "[t]he majority of the opinions in the canon were written with the average reader in mind [with the] rhetorical strategies [of the individual opinions] stress[ing] the importance of the issues being considered by highlighting their universality and by making them human rather than legal."¹²⁹

Third, *In the Opinion of the Court* compares and contrasts the prevailing style of United States Supreme Court opinions with the style in certain lower federal court opinions—consisting of both the appellate opinions of the circuit courts of appeal and the trial level opinions of the district courts.¹³⁰ As noted by the author of the book:

The bland, homogenous style that dominates the judicial opinions of the High Court today also dominates the opinions of the lower federal courts. At the same time, however, lower federal court judges are seeking to distinguish themselves and their opinions with a variety of stylistic approaches. These draw upon and expand the approaches that federal judges in earlier decades had used. The difference, however, is in the significantly greater number of judges who are writing distinctive opinions and in the frequency with which they write them. The opinions of the lower federal courts, as a result, are now defined by what had been the exception in earlier times. The reader, of course, benefits from the variations in style. The readers of current Supreme Court opinions wade through bland prose. But readers of the lower federal court opinions, while they too encounter blandness, frequently find prose that, more than merely amusing or

126. 17 U.S. (4 Wheat.) 316 (1819).

127. 410 U.S. 113 (1973). The other nine "canon" opinions, in Domnarski's view, are Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), Justice Black's opinion in *Chambers v. Florida*, 309 U.S. 227 (1940), Justice Black's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Chief Justice Warren's opinion in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), Chief Justice Warren's opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966), Justice Jackson's opinion in *West Virginia State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943), Justice Black's opinion in *Gideon v. Wainwright*, 372 U.S. 335 (1963), Chief Justice Warren's opinion in *Loving v. Virginia*, 388 U.S. 1 (1967), and Justice Douglas' opinion in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See DOMNARSKI, *supra* note 14, at 77-89.

128. Domnarski explained his selection method as follows:

In constructing my canon I have used the following criteria: the judicial opinion (1) comes from the United States Supreme Court, (2) establishes or acts as a harbinger of (3) an important rule (4) affecting a fundamental aspect (5) of the American democracy or the American way of life (6) with clarity, conviction, or eloquence.

DOMNARSKI, *supra* note 14, at 77.

129. *Id.* at 88.

130. See *id.* at 90-115.

lively, draws the legal issues and the judiciary's response to them into sharper focus.¹³¹

The difference between Supreme Court opinions and the opinions of the lower federal courts, according to Domnarski, is due to two key factors: (1) the "greater intimacy with the litigation process"¹³² in the lower federal courts compared to the High Court's often rarified view of the litigation process, and (2) the large group dynamics involved with Supreme Court writing where nine justices "can have a hand in what is ultimately written"¹³³ compared to the court of appeals judges where panels typically consist of only three judges, and therefore, "the judge who writes the opinion has more opportunity to write the opinion as he or she wants."¹³⁴

Fourth, Domnarski briefly examines the evolution of lively and unique appellate judicial opinion writing styles over the course of the last century.¹³⁵ In the course of this evolutionary discussion, he cites examples of noteworthy and admirable judicial opinion styles including the opinions of the following United States Circuit Judges: Learned Hand,¹³⁶ Jerome Frank,¹³⁷ Henry Friendly,¹³⁸ Abner Mikva,¹³⁹ Amalya Kearse,¹⁴⁰ Frank Easterbrook,¹⁴¹ and Bruce Selya.¹⁴²

Finally, *In the Opinion of the Court* adds to our understanding of stylistic devices utilized by federal appellate court judges who are "interested in

131. *Id.* at 90. Lower federal court opinions, according to Domnarski, have an enormous quantitative impact on the "flow" of legal language in American culture. As the author notes in this regard:

The [federal district and circuit] courts together publish more than ten thousand cases in the *Federal Supplement* and the *Federal Reporter* each year. In the fifty or so combined volumes of the *Federal Supplement* and the *Federal Reporter* the West Publishing Company produces approximately eighty thousand pages of opinions from the district and circuit courts annually. Each volume has about sixteen hundred pages, and approximately twenty five of each series comes out in a year. Each page of either series contains approximately 750 words. Put differently, West Publishing publishes approximately 60 million words of judicial opinions from lower federal courts each year.

Id. at 92.

132. *Id.* at 94.

133. *Id.*

134. *Id.*

135. Domnarski, in a related way, also alludes to what he, tongue-in-cheek, refers to as the "peripheral amusements" of lower federal court opinions. *Id.* As specific illustrations of these "peripheral amusements," the author refers to opinions reflecting "the offbeat, the controversial, or the juicy," as well as humor in various guises. *Id.* at 93, 94.

136. *See id.* at 97-99.

137. *See id.* at 101-02.

138. *See id.* at 103.

139. *See id.* at 105.

140. *See id.*

141. *See id.*

142. *See id.*

distinguishing their opinions."¹⁴³ Domnarski catalogs and discusses stylistic techniques in current federal appellate opinions noting the following examples: "dramatic introductions, apt or poignant introductions, angry introductions, and humorous introductions;"¹⁴⁴ humor, including "subject matter puns,"¹⁴⁵ revelation of "a party's stupidity, sometimes with deadpan analysis,"¹⁴⁶ "decidedly unjudicial subheadings,"¹⁴⁷ and mocking of counsel's performance;¹⁴⁸ "use [of] various forms of figurative language"¹⁴⁹ like epigrams,¹⁵⁰ hyperbole,¹⁵¹ extended metaphors,¹⁵² literary allusion,¹⁵³ and "Bardalotry through reference to Shakespeare."¹⁵⁴

B. Judge Coffin's Approach

Judge Frank M. Coffin, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, has made several interesting observations about appellate judicial opinion style.¹⁵⁵ His most recent contribution is encapsulated in the book, *On Appeal: Courts, Lawyering and Judging*.¹⁵⁶ Judge Coffin's personal insights on appellate judicial opinion style in *On Appeal* are illuminating; they can be placed under a number of different points, as follows.

1. The "construction" of an appellate opinion is "the core of appellate judging" since the written opinion reflects a "judge's unique qualities, values, methods, tone, and approaches."¹⁵⁷

143. *Id.* at 107.

144. *Id.*

145. *Id.* at 112.

146. *Id.* at 109.

147. *Id.* at 112.

148. *See id.* at 113.

149. *Id.*

150. *See id.* For example, Judge Frank Easterbrook noted that "judges are not like pigs, hunting for truffles buried in briefs." *Id.* (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

151. *See id.* at 114.

152. *See id.*

153. *See id.*

154. *Id.* at 114-15. For an eloquent and scholarly exercise of bardalotry and the law see DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL* (1994).

155. *See, e.g.*, FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980).

156. FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING AND JUDGING* (1994). In addition to observations on appellate judicial opinion style, Judge Coffin also addresses an assortment of other interesting subjects on appellate practice and advocacy including the following: the English appellate tradition; the American appellate tradition; comparisons between state and federal appellate systems in the United States; practical advice to appellate lawyers about briefs and oral arguments.

157. *Id.* at 171.

2. A written appellate opinion serves three important jurisprudential functions: "it decides a case, ending at least one dispute between the parties; it continues the story by making some law, from a little bit of interstitial law to a huge chunk; and it projects the story into the future by giving intimations of further directions."¹⁵⁸

3. Each written appellate opinion should rationally be preceded by a "triage" assessment by the writing judge. This assessment is not a willingness to decide some cases incorrectly, but rather, a willingness to sacrifice "the length, depth and elegance of the reasoning" in written form for the sake of keeping current with the appellate caseload.¹⁵⁹

158. *Id.*

159. *Id.* at 176. Judge Coffin's tripartite "Topography of Cases," from least burdensome, and therefore subject to sacrifice in written analysis, to most burdensome—requiring a thorough, full-dressed written opinion is as follows:

1. *Light:* Cases in which the disposition, order, or opinion can ordinarily be expected to take from one or two hours to no more than half a day [with law-clerk assistance].

- a. *Affirm on the Opinion Below*
- b. *A Short Order of Several Lines*
- c. *Memorandum Opinion or Per Curiam*

2. *Moderate:* Cases in which an opinion should ordinarily be prepared in from two or three days to a week.

- a. *A Simple, Fact-Intensive Unpublished Opinion.*
- b. *A Straightforward Application of Law to Facts.*
- c. *Line Drawing.*
- d. *Statutory Construction.*

3. *Heavy—the Blockbusters:* Cases in which, for various reasons, the expected time investment is substantial. By "substantial" I mean from two to six weeks. The advent of such a case in a chambers requires careful planning and readjustment of work schedules so that the remaining work goes forward as the "biggie" slowly moves forward.

- a. *The Multi-issue, Multi-defendant Case.* The paradigm of this kind of case is the criminal prosecution of a drug conspiracy, involving many defendants, wiretaps, one or more searches and seizures, incriminating conversations with codefendants, exclusion of some evidence and admission of some, rulings on expert witnesses, alleged prosecutor overreaching in argument, refusal to sever trials of various defendants, challenges to sufficiency of evidence as to some, and claimed errors in the instructions to the jury. The very magnitude of the trial record and the multiplicity of issues assure me that a very large piece of work is involved, requiring up to four weeks of a lawclerk's time and from a day or so to several days of my time.
- b. *An Overarching Legal Issue.* The facts may be relatively few, uncomplicated, and undisputed. But the task of legal analysis is a heavy one. It may take a number of forms: a crucial, threshold decision (is a municipal ordinance content-based? Is a suspect "in custody"?); a delicate balancing act (do institutional interests outweigh individual rights?); a deep policy analysis (should sectarian high schools be more immune to church-state establishment clause scrutiny than sectarian universities? . . .); study of a cluster of diametrically opposed cases to decide which group is to be followed; or a microscopic study of an enigmatic Supreme Court decision.
- c. *An Overarching Factual Question.* This type of case requires the opinion writer to master a lengthy transcript and many exhibits. Examples are an antitrust case

4. In "[d]oing an [o]pinion," an appellate judge like Coffin "immerse[s himself] in [a] case totally, drawing first upon everything the parties and the judge below have said."¹⁶⁰

The case at this point is like a tidal pool, recently stirred by the tide. Everything is cloudy and in motion. My faith is that if I just wait long enough and observe closely enough, the water will clear. So I begin my rereading and note-taking. I start with my very brief and impressionistic argument notes, just to refresh my memory as to lively issues. Then I look at my very skeletal notes of our [judges'] conference to see if either of my colleagues [on the panel] had voiced some idea that I should keep in mind. Then I pick up the briefs [again].¹⁶¹

5. Following an immersion phase, an appellate judge, adhering to Frank Coffin's methods, would "[p]ause for [b]earings" and then "summon [his] troops, [his] clerks, and . . . have a wide-ranging discussion" about a variety of key stylistic and substantive issues described as follows:

turning on market share, a case involving a decision by the Food and Drug Administration not to approve a new drug for use, and a challenge to the sufficiency of an environmental impact statement issued in connection with the proposed construction of a major air terminal.

- d. *Court Policy.* A case may not turn on any caselaw, statute, regulation, or constitution, but on the court's supervisory power over courts within the appellate court's jurisdiction. Matters of practice and standards of behavior affecting judges and lawyers are frequent subjects. Because any decision dealing with such issues must be clear, fair, and practicable, great care in phrasing is required and usually all members of the court are invited to comment.

Id. at 177-80.

160. *Id.* at 183.

161. *Id.* Judge Coffin's "immersion" phase of opinion writing also involves a check of the appellate record and browsing, on occasion, into collateral legal materials like law review articles and treatises. As poignantly expressed by Coffin:

The briefs having been read, I realize that I shall not really "know" the case until I have gone through the record. But I know that I can spend several entrancing hours with a record and retain only general impressions unless I can retrace my tracks. So I emulate Theseus when he entered the Minotaur's maze and leave a thread behind me as I go forward. This thread, in the form of a crude index of major facts and the pages on which they are found, is my assurance that I can retrace my steps and, when I am in danger of being overwhelmed by detail, see with some perspective the relation of events. I have no doubt that today a judge with greater word-processing sophistication than I possess could make a computer program that does for judges what the thread did for Theseus.

Sometimes, if fancy suggests and time allows, I shall go beyond the briefs and record, and browse. I shall look into law review articles that have long lain on my desk or I shall open a treatise or two and "read around" the issues. Once in a while I find some ore worth mining. What this kind of experience teaches me is that when one sets forth to work on what could be a significant opinion, it is a pearl of great price not to be harassed by tight deadlines.

Id. at 184.

In this kind of case, just exactly what is the standard of review? Even if there was a waiver of this objection, should we nevertheless reach the merits? If one issue proves dispositive, should we deal with any of the other? Should we decide on a narrow or a broader ground? Do we want to make a ringing precedent, or should we minimize the precedent by affirming on alternate grounds? Invariably I leave such a conference refreshed and inspired.¹⁶²

6. On “[t]he [r]oad to [j]ustification”—moving well beyond the decision on the merits in a case to the explicit rationale for the decision—Judge Coffin suggests a twofold preliminary process: outlining a draft opinion and writing the first draft of the opinion. As explained by Judge Coffin:

Outlining is not a task that I perform all at once. I do my outlining not only in sequential stages, but in different layers of detail. I first concern myself with outlining the preliminaries?everything leading up to my analysis and discussion of the merits. I do not attempt an outline of the merits at this point. Also, in outlining both the preliminaries and the merits, I act again like the cross-country traveler: when I come to a big city like Chicago (or a complex section of an opinion), I need a more detailed road map on a larger scale. So I make sub-outlines.

....

I am now ready to outline my treatment of the merits. Of course, the first decision will be to determine the order in which the issues, if there are more than one, should be discussed. I suspect that generally the most important issue should lead off. But not necessarily. It may be that disposing of less important issues will clear out the underbrush and lead logically to the final and dispositive issue. As priority of issues is considered, I also am thinking of grouping issues, some deserving very summary treatment, and some deserving no treatment at all.

I am now ready to begin writing. I realize that I still shall have to stop along the way to make a more detailed sub-outline if an issue warrants it. At this point, I usually sense a welling of enthusiasm as I begin to express the fruits of more creativity.¹⁶³

7. The culmination of Coffin’s opinion writing process consists of the “[f]inal [t]ouches” of editing the draft opinion, and then, “[c]irculating the [d]raft” to his colleagues on the appellate panel.¹⁶⁴

The “proof of the pudding” is the feeling of satisfaction that comes in “working up an opinion”. As explained by Judge Coffin:

162. *Id.* at 184-85. (Original emphasis).

163. *Id.* at 186, 188-89.

164. *Id.* at 190.

Sometimes, often enough to make me aware of the privilege of being an appellate judge, the process of working up an opinion from the raw materials of the cold record, the contesting briefs, the existing law, history, logic, custom, and such considerations of policy and social justice as the case permits, becomes an intense, all-engulfing, and fulfilling experience.¹⁶⁵

C. Miscellaneous Viewpoints

In ending my discussion on appellate judicial opinion writing style, it is appropriate to briefly mention some other, antecedent, viewpoints.

1. *Judge Edward Re*. In his brief pamphlet published by the Federal Judicial Center, Judge Re opines that, "[t]here is no such thing as an exclusive style. We each have our own particular style. There is, however, good writing as distinguished from poor writing. For each of us the question is whether the writing represents our best effort."¹⁶⁶

The "A, B, C" of good appellate opinion writing, for Judge Re, boils down to "Accuracy, Brevity and Clarity."¹⁶⁷

2. *Dean John H. Wigmore*. According to Wigmore:

[T]here can be no one and exclusive style, appropriate for a judicial opinion. It may begin by rehearsing the facts, or it may begin by stating the question of law; it may notice the arguments pro and con, or it may merely state the conclusions reached; it may pay attention to precedents distinguished, or it may not; and so on. But there is one thing that it must do, viz., it must *state plainly the rule upon which the decision proceeds*. This is required, in theory, because the [Appellate] Court's function is to declare the law; and in practice, because the Bar is entitled to know exactly what rule they can follow in advising clients and in trying cases.¹⁶⁸

3. *Professor Robert Leflar*. In a law review article published in *Columbia Law Review*, Leflar observed:

Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is "dressing" merely, and that the functions of opinions are served wholly by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not. It may be semi-literate, graceless, obscure, opaque. It may be simple, clear, plain. It may be florid, subtle, or fancified, repetitious, elaborate, or sketchy, garrulous,

165. COFFIN, *supra* note 155, at 155.

166. EDWARD D. RE, APPELLATE OPINION WRITING 1 (1975).

167. *Id.* at 3.

168. APPELLATE JUDICIAL OPINIONS 155 (Robert A. Leflar ed., 1974) (quoting 1 WIGMORE ON EVIDENCE 253-54 (3rd ed. 1940)).

or meticulous. There may be emphasis on policy and theory, on practical socio-economic effects, on precedents, or on counsels' briefs. Whatever it is, it determines how effectively the substantive content of opinions is conveyed; in fact, it determines whether there really is a usable substantive content, and what that content is.¹⁶⁹

4. *Justice James D. Hopkins.* Justice Hopkins, a former judge of New York's intermediate appellate court, wrote a pithy law journal article about appellate judicial opinion style, articulating several incisive points. Among the most interesting points in his article are the following:

Judges write opinions for an audience. The audience varies as the case varies.

The opinion, as an expression of judgment, is an essay in persuasion. The value of the opinion is measured by its ability to induce the audience to accept the judgment.

The nature of the audience is defined by the case. When the issue is essentially factual, the audience usually consists of the parties and their attorneys. When the issue is essentially legal, the audience usually consists of the parties, their attorneys, and the bench and bar. When the issue has public implications, the audience includes the legislature, public officials, the news media, and the community.

.....

The style of an opinion has two aspects—the organization of the discussion, and the composition of the language.

The organization of the discussion means first, the approach of the author to the issue, and second, the method employed to make the discussion clear and concise.

The approach should always be measured, temperate, and objective. Rhetoric is best suited for the advocate; an opinion expresses a decision above the individual passions in the case.

The method of the discussion is not bound by any one rule. An opinion considering several issues may be divided into branches. Footnotes are useful when they inform the reader as to relevant citations and material not crucial to the decision or contain quotations at length of statutory provisions and pivotal testimony. Footnotes breed irritation when their number and proximity interrupt the flow of the discussion.

The operative facts should be stated in depth preceding the discussion in the opinion concerning their effect and the operative law. This is not an absolute: sometimes disparate issues arise from unrelated facts, and divisions of the discussion as to both fact and law pertinent to each issue assist understanding.

169. *Id.* at 161 (quoting Robert A. Lefflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 816 (1961)).

One cardinal rule: do not omit the facts which are stressed by the unsuccessful party or a doctrine which may be at war with the ultimate disposition. Otherwise the standing of the case both as to persuasiveness and as a precedent is impaired.

....
Metaphors illuminate, yet may also be delusive. Be sure that they truly fit the pattern illustrated, and are not so remote in their bearing that the reader loses his way in underbrush.

....
Humor has a dubious place in an opinion. It is not an universal commodity and the decision of the rights of the parties is a serious matter. Irony may be an effective tool of expression, when sparingly used, but sarcasm directed toward the parties is seldom in good taste.

....
At some point in the opinion appears its fulcrum. That is where the author ends his discussion of the operative facts and law and begins his explanation of the decision. The value of the opinion largely hinges on this section. Make sure that it expresses the intent of the decision fully and clearly.

....
Put the decision on a major ground. Recall that the opinion loses worth as a precedent if the decision rests on alternative grounds. Sometimes this cannot be helped: the grounds are equally significant and each is necessary to the proper disposition of the case. But generally the opinion should determine the issue on one major ground.

....
Brevity is the soul of wisdom. Yet, do not be so brief as to be cryptic. The audience may not always appreciate the author's desire to shorten the opinion to the irreducible minimum.¹⁷⁰

5. *Professor Walker Gibson.* As a poet and professor of English, Walker Gibson had some salient advice for melding literary style with judicial opinions. Specifically, he wrote:

The problem of composing good judicial writing cannot finally be so very different from the problem of composing any kind of good writing. The issues to be faced are the same, and . . . they come down pretty simply to a recognition of the virtues of one's reader. If I can *recognize* my reader, if I can see in him a person of discretion and taste, one who shares with me a sense of the world's multiplicity and a sense of the tenuous relation between language and experience, then I am

170. *Id.* at 164-67 (quoting James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES' J. 49 (1969) (numbers before paragraphs omitted)).

all right. By recognizing him, I define him, and we may hope to communicate across the guarded boundaries that divide us.

The writer of legal documents, of whatever sort, may be doing himself an injustice if he fails to accept such an ambitious and high-minded notion of his art, choosing instead to think of himself as a relatively mechanical and lowly worker in words.

... But the situation is surely quite otherwise. The poet or novelist, the historian, the physicist, the appellate judge are all deeply involved in one essential responsibility: the expression of life's complexities in mere man-made words. Wherever he starts, whatever trivial item of human experience he initially confronts, the legal writer can make his stab at eloquence.¹⁷¹

IV. JUDGE POSNER'S APPELLATE OPINIONS, 1981-82: A STUDY IN JUDICIAL OPINION STYLE DURING HIS ROOKIE SEASON ON THE BENCH

A. *The "Kid" as Heavy-Hitter*

At the moment in late 1981 when Richard A. Posner assumed the duties of the United States Court of Appeals Judge for the Seventh Circuit, he possessed extraordinary academic prowess, and considerable potential to be an outstanding federal judge. In this regard, he had helped to develop and refine the important interdisciplinary approach to law called law and economics.¹⁷² As noted by Professor George Priest of the Yale Law School, Posner's 1973 book entitled *Economic Analysis of Law* "put forth [the] proposition that the common law is efficient, that it had some characteristics which achieved economically efficient ends. This was at the same time an extremely simple and extremely ambitious attempt at explaining the common law system."¹⁷³ In the years

171. *Id.* at 185-86 (quoting Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 930 (1961)).

172. See DOMNARSKI, *supra* note 14, at 116-17.

173. *Id.* at 118. Professor Priest elaborates on Posner's law and economics theoretical contributions as follows:

Posner's law and economics approach is a heightened, intensified form of functionalism. It asks about the effects of the law and what effects will one legal rule have on one another. That approach has been pursued for a long period of time. It wasn't always called law and economics, but it was part of legal realism in a way. What Posner did was to really intensify the focus of effects of legal rules and legal institutions and then to show how important economic analysis was for evaluating those effects. To say that he changed the way people saw the law may well be right, but it was a change that caused the legal scholars to have to address in much more serious form what the effects of the law were.

Id. (quotation marks in original).

following his Phi Beta Kappa honors as a Yale undergraduate in 1959, graduating first in his class in 1962 at Harvard Law School (preceded by service as president of the law review), service as a law clerk to United States Supreme Court Justice William Brennan, and work as assistant to two Solicitor Generals of the United States (Thurgood Marshall and Erwin Griswold), Posner held law teaching positions at Stanford in 1968 and at Chicago beginning in 1969—becoming the youngest tenured professor in the school's history.¹⁷⁴

As pointed out by William Domnarski, "[a]s a working intellectual he wrote nine books and ninety-three articles [on law] in twelve years before going onto the [federal appellate] bench" in 1981.¹⁷⁵ During this time, he also "found time to teach and to found and edit for nine years the *Journal of Legal Studies*, which consistently published law and economics articles."¹⁷⁶ According to University of Chicago professor, Gary Becker, who won the Nobel Prize in economics in 1992, the quantity and quality of Posner's law and economics scholarly production during this time is without parallel.¹⁷⁷

Beginning with his first batch of written opinions for the Seventh Circuit in late 1981, Posner "took to the . . . diet of cases with enthusiasm, taking particular delight in diversity cases, which gave him the chance to work in common law areas such as torts and contracts."¹⁷⁸ Moreover, right from the start of his judicial career, Judge Posner exhibited a free-flowing literary style, which drew upon his extraordinary store of eclectic knowledge and was characterized by a stellar combination of breadth and depth in many of his judicial opinions.¹⁷⁹

B. First Innings: Posner's Initial Hundred Days as a Federal Appellate Judge

1. First Opinions: His December 1981 Trilogy

Posner wrote his first three opinions as a federal appellate judge of the United States Court of Appeals for the Seventh Circuit in late

174. *See id.* at 119-20.

175. *Id.* at 116. Amazingly, in the fifteen year period, beginning with his joining of the federal bench in 1981 through 1995, Posner wrote *another* thirteen books and ninety-five articles. *See id.*

176. *Id.* at 119.

177. *See id.* at 117.

178. *Id.* at 121.

179. For a concise and general discussion of Posner's judicial opinion style over the first thirteen or so years as a federal judge see *id.* at 122-55. This analysis by Domnarski has substantially influenced my own thinking about Posner's "rookie year" on the bench in 1981-82.

December of 1981, publishing these opinions within three weeks of having heard oral argument. His first opinion, in the case of *Dower v. United States*,¹⁸⁰ dealt with a rather simple issue involving a taxpayer's appeal of the district court's summary judgment in favor of the Government in a suit for refund of his federal income taxes. In a three page opinion for the court, without subheadings or footnotes, Judge Posner cited only five cases in addition to a single citation to both the Internal Revenue Code and Treasury Regulations.¹⁸¹ This opinion dealt with a single issue that hinged on a perusal of the record of past shareholder lawsuits and a determination of "the origin and character of the claim that was litigated"¹⁸² to determine whether or not the taxpayer's financial settlement of these suits was a deductible business expense. Posner's tone consists of an "inquiring, expository voice,"¹⁸³ his prose usage is active, fluid and brisk.¹⁸⁴ The chief portion of the opinion—in an undivided, unsectionalized, unified essay—is his discussion of the facts wherein it can be said that he "reduce[s] them to their essentials, and carries the reader along with the developing story as if he were writing fiction or good journalism,"¹⁸⁵ while "[m]otives are exposed and occasionally commented upon."¹⁸⁶ For example:

However unartfully drafted, the 1952 and 1965 agreements evidently were designed to make provision for the Key Men in the event that the business was wound up or Dower, the dominant figure in it, departed.

....

Dower also points to certain recitals in the settlement agreement to the effect that his intention in settling was to preserve his position in [the successor corporation] and avoid the derivative suit. These recitals could have had no purpose other than to throw the Internal Revenue Service off the scent; they have no probative value in this litigation.¹⁸⁷

Posner's second opinion for the Seventh Circuit, in the case of *United States v. Carlone*,¹⁸⁸ was a criminal case involving the Government's appeal of the trial judge's order dismissing the indictment for failure to

180. 668 F.2d 264 (7th Cir. 1981).

181. "Each page of *Federal Reporter* text contains approximately 750 words." Domnarski, *supra* note 14, at 144. Therefore, this opinion was approximately 2,250 words in length.

182. 668 F.2d at 266.

183. DOMNARSKI, *supra* note 14, at 125.

184. *See id.* at 129.

185. *Id.*

186. *Id.*

187. 668 F.2d at 267-68.

188. 666 F.2d 1112 (7th Cir. 1981).

comply with the Speedy Trial Act.¹⁸⁹ In a three and one-half page opinion for the court, without subheadings or footnotes, Posner reasoned that the Speedy Trial Act did not require that a continuance, which was valid when granted (which upon hindsight the trial court thought should not have been granted to the Government) automatically compelled dismissal of the indictment. Posner cited no caselaw in his opinion; his only citations were to subsections of the Speedy Trial Act, the *Federal Rules of Criminal Procedure*, and *The Seventh Circuit Rules*. The opinion in *Carlone* addressed a single issue, which focused on the course of the pretrial proceedings in the case and whether the Government's continuance of the trial was in bad faith or caused any prejudice to the defendant. Posner's tone was sarcastic and angry; his prose deployment was brisk. Again, the major part of the opinion was an insightful exploration of the facts—in this case, procedural facts. Hinting at a disproportionately severe sanction against the Government by the trial court's dismissal of the indictment in juxtaposition with the trial judge's misinterpretation of the conduct of the Government in trying to obtain the testimony of essential European witnesses, Posner is also witty. For example:

There is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid *ab initio* if the reasons for which the continuance was granted turn out not to be the actual causes of the delay that the continuance allows. Contingencies not foreseen when the continuance was asked for and granted may arise that prevent the government from using the continuance for the purposes for which it was granted. If so, the court can refuse to grant further continuances; it can revoke or shorten the continuance; but it is not *required* to revoke the continuance with effect back to the original trial date. We are unwilling to read so inflexible a mandate into the Act.

An alternative reading of the district judge's opinion is that he was revoking the continuance with effect back to the original trial date as a discretionary sanction for the government's misuse of the time allowed it by the continuance. Courts do have broad and flexible powers to prevent the abuse of their processes; but where, as here, the exercise of those powers results in forever precluding the government from trying defendants accused of serious crimes, there is a danger that it is the powers themselves that are being abused. To dismiss an indictment with prejudice, as the court in effect did here, is to punish not only the prosecutor but the entire law-abiding public. Alternative

189. See 18 U.S.C. §§ 3161-3174 (1994).

sanctions are available that do not involve such windfalls for law breakers.

....

We therefore reverse; and because we think that relations between the trial court and the prosecutor may have become frayed beyond repair by the events leading up to the court's order . . . we remand the case to a different judge for further proceedings in the matter.¹⁹⁰

Completing his December *tour de force* of opinion writing, Judge Posner wrote the opinion for his Court of Appeals panel in *United States v. McAnally*¹⁹¹—another criminal case, resulting in another reversal. The case involved the conviction below of James McAnally for violating a federal statute, which provides that any “officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank who makes any false entry in any book, report, or statement of such bank with intent to injure or defraud the bank” is “guilty of a felony punishable by up to five years’ imprisonment.”¹⁹² In a three page opinion, without subheadings or footnotes, Judge Posner quickly affirmed the trial court’s denial of McAnally’s motion for acquittal because of alleged insufficiency of the evidence.¹⁹³ Posner concentrated his analysis and exposition on the persuasiveness of McAnally’s motion for a new trial because of alleged error in the jury instructions. Posner’s tone is sarcastic, biting and compassionate. He cited five cases, two scholarly treatises, and pertinent sections of the federal criminal statute at bar. He also used a hypothetical to illustrate a point. Posner’s key concern in the case was the trial court’s confusing jury instructions below: “[a] reckless disregard by a bank official of his bank’s interest is sufficient to establish the requisite intent to defraud” under the federal statute.¹⁹⁴ Posner enlists colloquial and figurative language, while, also employing law and economic insights to make his opinion for the Court in *McAnally*, in which he explained that intent and not carelessness was an element of a false-entry offense, the vivid, memorable, and nuanced:

The term “reckless” covers a broad range of meanings to lawyers, and probably an even broader one to laymen. In law it is sometimes used interchangeably with gross negligence and in the absence of a

190. *Carlone*, 666 F.2d at 1115-16.

191. 666 F.2d 1116 (7th Cir. 1981).

192. *Id.* at 1117 (quoting 18 U.S.C. § 1005 (1994) (the imprisonment period was increased to twenty years in Pub. L. 101-73 (1989), and then to thirty years in Pub. L. 101-647 §§ 2504(d), 2595(a)(3)(A), (B), 2597(h) (1990))).

193. *See McAnally*, 666 F.2d at 1117.

194. *Id.* at 1118.

clarifying instruction the jury might have so understood it here. If so, the jury might have seriously misunderstood the false-entry offense. That offense has two elements (so far as relevant here): a false entry, and an intent to injure or defraud. The first is satisfied by showing that the entry was inaccurate. If the second could be satisfied by showing that the inaccuracy was the result of gross negligence, then section 1005 would make gross negligence by bank employees in making entries on the books of the bank a felony. It is unlikely that the statute was intended to go so far to protect banks and their customers from the misconduct of bank employees. There must be at least a hundred thousand bank officers in this country, many of them, like McAnally, young and inexperienced employees of small and unsophisticated banks. These officers make in the aggregate millions of entries in the books of their banks every day; no doubt many of those entries are inaccurate; and many of the inaccuracies are probably due to negligence, some of it gross. We do not think Congress meant to expose all of these bank employees to felony prosecutions; [there is] the danger that the heavy penalties prescribed in section 1005 would over-deter, with resulting social costs¹⁹⁵

2. The First Three Months of 1982

The first quarter of 1982 completed Posner's first hundred days as a federal appellate judge. During this time frame, Judge Posner authored another sixteen opinions for the Court of Appeals,¹⁹⁶ for a total of nineteen published opinions during his first hundred days. This expeditious and prolific pace was a portent of his future productivity as an appellate judge.¹⁹⁷

The sixteen court opinions written by Posner during the first quarter of 1982 covered a broad spectrum of issues: two opinions on labor

195. *Id.* at 1119 (citations omitted).

196. See *Donovan v. Ill. Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982); *Wilson v. Intercollegiate (Big Ten) Conf. Athletic Ass'n*, 668 F.2d 962 (7th Cir. 1982); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982); *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir. 1982); *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1982); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982); *NLRB v. Coca-Cola Co. Foods Div.*, 670 F.2d 84 (7th Cir. 1982); *Arias v. Rogers*, 676 F.2d 1139 (7th Cir. 1982); *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982); *United States v. Lewis*, 671 F.2d 1025 (7th Cir. 1982); *Powers v. United States Postal Service*, 671 F.2d 1041 (7th Cir. 1982); *Davis v. Franzen*, 671 F.2d 1056 (7th Cir. 1982); *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982); *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171 (7th Cir. 1982); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982).

197. William Domnarski, assessing Posner's first thirteen years on the federal bench, observed that during this timeframe Judge Posner "wr[ote] more than thirteen hundred opinions," DOMNARSKI, *supra* note 14, at 122, or an average of a hundred opinions a year, twenty-five per quarter, or eight per month.

law,¹⁹⁸ two opinions on federal jurisdiction,¹⁹⁹ two opinions on constitutional law,²⁰⁰ one opinion on social security and public welfare law,²⁰¹ one opinion on employment discrimination law,²⁰² one opinion on immigration law,²⁰³ two diversity case opinions on state tort law,²⁰⁴ two opinions on federal criminal law and procedure,²⁰⁵ one opinion on federal contracts law,²⁰⁶ and two opinions on federal securities law.²⁰⁷ In the course of these sixteen opinions Judge Posner continued to define and elaborate his judicial opinion style. In a general sense, he persisted in writing relatively short opinions with no footnotes or subdivisions, continued a pattern of sparse and focused citation to authoritative cases and statutes, sustained an informal and colloquial tone, and pursued a contingent, exploratory approach in reasoning (rather than writing in a mechanical way, as if legal conclusions were obvious).²⁰⁸

In several specific ways Posner employed vivid, fresh, and relatively rare stylistic devices in these judicial opinions that served to heighten the interest level of the reader while achieving a fact-sensitive, doctrinally-focused, economically-justified, policy-based reasoning gestalt. Several examples from these sixteen opinions illustrate the specific qualities of the inchoate, seminal Posnerian opinion style.

a. Context Awareness of Legal Issues of First Impression

Remarkably, in half of the sixteen Posner opinions for the Seventh Circuit written during the first quarter of 1982, Judge Posner observed that—either directly or obliquely—an issue was novel or was a matter of first impression.²⁰⁹ For example, in *NLRB v. Coca Cola Co. Foods Div.*, Posner wrote: “We are presented with a question apparently of first impression regarding the power of the National Labor Relations Board

198. See *Donovan*, 667 F.2d 638; *Coca-Cola*, 670 F.2d 84.

199. See *Wilson*, 668 F.2d 962; *By-Prod Corp.*, 668 F.2d 956.

200. See *Ellis*, 669 F.2d 510; *Sutton*, 672 F.2d 644.

201. See *Cummins*, 670 F.2d at 81.

202. See *Rucker*, 669 F.2d 1179.

203. See *Arias*, 676 F.2d 1139.

204. See *Hixon*, 671 F.2d 1005; *Evra Corp.*, 673 F.2d 951.

205. See *Lewis*, 671 F.2d 1025 (Internal Revenue); *Davis*, 671 F.2d 1056 (habeas corpus petition).

206. See *Powers*, 671 F.2d 1041.

207. See *Cenco*, 686 F.2d 449; *Curtiss-Wright Corp.*, 687 F.2d 171.

208. See *supra* notes 198-207.

209. See *NLRB v. Coca-Cola Co. Foods Div.*, 670 F.2d 84, 85 (7th Cir. 1982); *Arias v. Rogers*, 676 F.2d 1139, 1141 (7th Cir. 1982); *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1008 (7th Cir. 1982) (oblique reference); *Powers v. United States Postal Service*, 671 F.2d 1041, 1041 (7th Cir. 1982); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645 (7th Cir. 1982); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 952 (7th Cir. 1982); *Cenco* 686 F.2d at 452 (oblique reference); *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173 (7th Cir. 1982) (oblique reference).

to prohibit interference with concerted activities before they materialize."²¹⁰

Moreover, by way of further illustration, in *Arias v. Rogers* Judge Posner observed:

This appeal from the denial of a petition for a writ of habeas corpus requires us to consider a question of first impression in this circuit: whether someone who is in custody because the government is trying to deport him may test the legality of his detention in a habeas corpus proceeding after formal deportation proceedings have begun but before a final order of deportation has issued.²¹¹

b. Penetrating Policy-Based Analysis

Posner's first flush of opinions for the court, in early 1982, during his first hundred days as a judge, exhibit an overarching attention to policy concerns: what might be viewed as the purpose of rules, the pragmatic functioning of relevant legal doctrine, or the advisability of choosing one body of potentially applicable principles over another body of applicable principles. Indeed, in *Donovan v. Illinois Education Ass'n*,²¹² Judge Posner, writing an opinion that reversed the U.S. District Court, captured the precise policy spirit of the dispute. He examined union bylaws, which guaranteed board seats and "[r]epresentative [a]ssembly" positions to four minority groups—blacks, Asians, persons of Hispanic background and American Indians—but noted: "our concern is not the racial incidence of the restrictions, but with their impact on freedom of candidacy and voting [as mandated by federal labor statutes]."²¹³ In

210. *Coca-Cola Co.*, 670 F.2d at 85.

211. *Arias*, 676 F.2d at 1141. Other examples of direct and oblique references to an issue of first impression include *Powers v. United States Postal Service*, 671 F.2d at 1041 ("The question we are called upon to decide in this case—one of first impression in this circuit—is whether state law or federal common law is to be used to decide a dispute between the United States Postal Service, as tenant, and a private landlord, concerning the landlord's right to terminate the lease for nonpayment of rent."); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645 (7th Cir. 1982) ("Thus the precise question we must decide is whether it is a denial of due process to tow a person's illegally parked car without giving him notice and an opportunity to be heard before the car is towed. The question is one of first impression at the federal appellate level."); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 952 (7th Cir. 1982) ("The question ? one of first impression ? in this diversity case is the extent of a bank's liability for failure to make a transfer of funds when requested by wire to do so."); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir. 1982) ("In any event, creating a new Illinois tort is something for the Illinois courts or legislature to do rather than the federal courts."); *Curtiss-Wright Corp. v. Heflund*, 687 F.2d 171, 173 (7th Cir. 1982) ("There is a surprising dearth of authority on what one might have expected to be a recurrent issue in class actions, the vast majority of which are settled rather than litigated.").

212. 667 F.2d 638 (7th Cir. 1982).

213. *Id.* at 641.

Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n,²¹⁴ Posner's opinion reversed the lower court's rather rigid application of the case law exception to the Federal Judicial Code's thirty day time limit for a defendant's removing federally-cognizable claims filed by the plaintiff in state court.²¹⁵ Posner paused in his analysis to probe the policy of the thirty day limit and its judicially-created exception by writing:

The purpose of the 30-day limitation is twofold: to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding whether to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place in the first court. These considerations might be overborne in a case where a plaintiff, seeking to mislead the defendant about the true nature of his suit and thereby dissuade him from removing it, included in his initial complaint filed in state court an inconsequential but removable federal count unlikely to induce removal and then, after the time for removal had passed without action by the defendant, amended the complaint to add the true and weighty federal grounds that he had been holding back.²¹⁶

*Powers v. United States Postal Service*²¹⁷ is another prominent example of Judge Posner's interest in discerning the policy basis of applicable rules, in this batch of sixteen 1982 opinions. Specifically, in *Powers*, Posner was interested in the reasons why it might, or might not be, appropriate for a federal court to develop a federal common law of landlord-tenant principles, when a federal agency, like the United States Postal Service, is a party to a lease with a private landlord. In inimitable style, Posner wrote:

the fact that federal courts have the power to create federal common law applicable to Postal Service leases does not mean that they have to exercise that power. If state law would provide as good or better rules of decision, a federal court can apply state law instead of creating its own rules. This is a frequent choice, especially in real property law, of which landlord-tenant law is a part.

....

Since we have found no persuasive reason for using federal common law rather than state law to decide the Postal Service's rights under the lease, since considerations of uniformity (really simplicity) of legal

214. 668 F.2d 962 (7th Cir. 1982).

215. *See id.* at 965 (the relevant statute is 28 U.S.C. §§1446(b) (1994)).

216. *Id.*

217. 671 F.2d 1041 (7th Cir. 1982).

obligations seem rather to favor state than federal law, and since in the absence of strong reasons one way or the other we would be inclined to defer to state law merely because federal lawmaking takes place against a background of state law that the federal courts should try to disturb as little as possible, perhaps we need say no more. But a powerful argument against applying federal common law in this case has yet to be mentioned: a federal common law in this case has yet to be mentioned: a federal common law of landlord and tenant does not exist. The federal courts could of course create that law, picking and choosing among existing state laws and proposed reforms in accordance with the recommendations of eminent scholars and practitioners. It is not to be expected that the federal courts would do a very good job of devising a model code of landlord-tenant law, since they have very little experience in landlord-tenant matters; and though eventually some body of law would emerge it would not in all likelihood be a uniform body, because there are twelve federal circuits and the Supreme Court could be expected to intervene only sporadically. In any event, during the protracted transition to settled law the uncertainties attending the rights and obligations of the Postal Service as tenant would be profound, and this would have several effects: the Postal Service's negotiations with prospective landlords would be more elaborate; its leases would be more detailed; and extensive research would be undertaken to predict the mature shape of emerging federal common law.

This discussion shows that we do not have to balance competing federal and state interests in this case after all. The overriding federal interest here is in certainty of right and obligation flowing from conformity to known law; the state interest is in offering its landlords a like certainty. These interests converge in favor of adopting, as the rule of decision to govern disputes under Postal Service leases, state law rather than federal common law.²¹⁸

218. *Id.* at 1045-46 (citation omitted). For other noteworthy instances of Posner's opinion style of policy-based concerns contained in opinions he wrote for the Seventh Circuit during the first quarter of 1982, see *Davis v. Franzen*, 671 F.2d 1056, 1058 (7th Cir. 1982) (policy considerations of rule that violation of the hearsay rule is not a per se violation of the Sixth Amendment); *Sutton v. City of Milwaukee*, 672 F.2d 644, 646-47 (7th Cir. 1982) (policy considerations regarding the impracticality of adopting a pre-towing non-emergency notice and hearing procedure); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 455-57 (7th Cir. 1982) (policy considerations in predicting how Illinois courts might decide a novel issue of tort law by examining tort law objectives of compensating victims and deterring wrongdoing in a case involving corporate fraud); and *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174-75 (7th Cir. 1982) (policy analysis of the equity of the district court judge's denial of one class action member's full proportionate share of settlement proceeds without a trial-like proceeding).

c. *Extraordinary Narrative Skill*

Posner's first quarter 1982 opinions are exemplars of narrative skill and fact-sensitivity.²¹⁹ In an easy, colloquial, informal manner, Posner's rendition of the facts in his early judicial opinions tells compelling stories without getting bogged down in prolix procedural history or irrelevant factoids so common in other appellate opinions. His factual narratives serve to naturally lead to the pivotal legal issues in the case. Of the sixteen opinions Judge Posner authored for the Seventh Circuit during the first quarter of 1982, three examples of his narrative brilliance and dexterity are instructive.

The first example involved a contorted and pathetic chain of events involving government ineptness in responding to the welfare of Indiana children who were buffeted in the conflicting claims of dysfunctional family members. Posner tells a poignant story in the process of framing the legal questions presented:

This is a suit under 42 U.S.C. § 1983 for injunctive relief and damages against several welfare and judicial officers (including a judge) in Putnam County, Indiana. The plaintiffs claim that their rights under the due process clause of the Fourteenth Amendment were violated by these officers in connection with proceedings that led to the plaintiffs' grandchildren (as we shall call them without meaning

219. This characteristic of Judge Posner's opinions has been described by one commentator as being reader-friendly in the following way: "Posner presents the entire case, from its facts to its analysis, in a way that teaches and informs. In an age in which the Socratic method still finds significant pockets of support in legal education, Posner in his opinions accomplishes more by relying on narrative skill and sheer exposition." DOMNARSKI, *supra* note 14, at 143.

For a theoretical literary explanation of the recent scholarly concern with the power and structure of narrative see M. H. ABRAMS, *A GLOSSARY OF LITERARY TERMS*, 123-24 (1993). As explained, in part, by Abrams:

A narrative is a story, whether in prose or verse, involving events, characters, and what the characters say and do. Some literary forms such as the novel and short story in prose, and the epic and romance in verse, are explicit narratives that are told by a narrator. In drama, the narrative is not told, but evolves in terms of the direct presentation on stage of the actions and speeches of the characters.

Narratology denotes a recent concern with narrative in general. It deals especially with the identification of structural elements and their diverse modes of combination, with recurrent narrative devices, and with the analysis of the kinds of discourse by which a narrative gets told. This theory picks up and elaborates upon many topics in traditional treatments of fictional narratives, from Aristotle's *Poetics* to Wayne Booth's *The Rhetoric of Fiction* (1961), but applies to them concepts and analytic procedures which derive from recent developments in Russian formalism and especially in French structuralism. Narratologists treat a narrative not in the traditional way, as a fictional representation of life, but as a systemic formal construction. A primary interest of structural narratologists is in the way that narrative discourse fashions a "story"—the mere sequence of events in time—into the organized structure of a literary plot.

Id. (emphasis omitted).

thereby to prejudge their status, which is contested) being removed from the plaintiffs' homes and adopted by strangers. The district court granted summary judgment for the defendants.

The plaintiffs are Amy Ellis, her sister Zella Frazier, and Zella's husband Cyril Frazier. Mrs. Frazier is the natural mother, and Amy Ellis the aunt, of Larry Ellis. In 1952 Mrs. Ellis adopted Larry with the consent of Mrs. Frazier. The adoption extinguished Mrs. Frazier's parental rights and vested them in her sister. Mr. Frazier is not Larry's father or otherwise related to him. He married Zella long after she had given up Larry for adoption.

Larry grew up and got married. Between 1969 and 1974 four children were born to the marriage. Larry and his wife were unsatisfactory parents, however, and the children lived for long stretches of time with Mrs. Ellis and Mrs. Frazier. In 1975 Mrs. Ellis complained to the defendants that Larry and his wife were mistreating the children. Her complaint led to criminal charges being lodged against Larry and his wife for cruelty and neglect. An order was entered removing the children from their parents' custody and placing them in a foster home, but the parents later regained custody, and were living with the children in Mrs. Ellis' home when, in July 1977, the mother decamped. Larry thereupon told the defendants that he wanted two of the children to remain with Mrs. Ellis and the other two to live with Mrs. Frazier. Larry took the two children to Mrs. Frazier's house and then disappeared.

....

The plaintiffs say that the defendants initially acquiesced in Larry's proposal to place the children in the homes of Mrs. Ellis and Mrs. Frazier, and that the plaintiffs thereby acquired legal custody of the children. One month later the defendant welfare officers ordered the plaintiffs, on two days' notice and without any explanation, to surrender the children to them. They placed the children in a totally unsuitable—in fact, notorious—group foster home where the female children were subjected to sexual abuse. When the plaintiffs complained, the welfare officers took the children out of the group home and placed them with foster parents but refused to tell the plaintiffs who the foster parents were or where they lived. The children were heartbroken at the separation from their grandparents and would have preferred to live with them.

The plaintiffs eventually retained a lawyer, who in May of the following year inquired of the defendant welfare officers about the children. The welfare officers, fearing that the lawyer would begin proceedings for the adoption of the children by Mrs. Ellis and Mrs. Frazier, filed in June a petition with the defendant judge to terminate the parental rights of Larry Ellis and his wife. Because their whereabouts were unknown, notice of the proceeding was by publication in the local newspaper. No effort was made to notify the

plaintiffs specifically, but their lawyer knew about the proceeding. A hearing was held on June 25, 1978, and the judge ordered the parental rights of Larry and his wife terminated. Neither the plaintiffs' lawyer nor any of the plaintiffs was at the hearing.

The termination cleared the way for the children to be adopted, and the plaintiffs set about trying to adopt them. But their lawyer was given the runaround by the defendant court officers, who offered niggling and specious objections to the formal adequacy of the petition for adoption. As a result she was forced to file a second, and on August 24 a third, petition. A few days later the defendants informed her that the children had already been adopted by others. The adoptions (each child was adopted by a different couple) had taken place after the plaintiffs' lawyer filed the first petition, and neither she nor the plaintiffs had actual or constructive knowledge of the adoption proceedings. The adoptions robbed the plaintiffs not only of their hopes of adopting the children themselves but also, it seemed, of any right ever to see them again, for the defendants told the plaintiffs that it would be up to the adoptive parents to decide whether to permit the plaintiffs to visit with the children.²²⁰

Posner's narratology in this family-government dispute tells a tale of woe and pervasive—but random—interconnectedness in the tradition of the novels of Charles Dickens. Like the mud and the fog, the Chancery, and the Old Curiosity Shop of Dickens' London, Posner conveys—through his narration of the facts told from the standpoint of the plaintiffs because of the procedural posture of the case involving an appeal from the summary judgment dismissal of the complaint—similar images of random interconnectedness in late twentieth century, rural Indiana. Posner's narration brings to mind faceless local courthouse bureaucrats, absentee parents, and anonymous adoptive parents. Yet, considering these facts "in the light most favorable" to the plaintiffs, Posner's opinion for the court found no due process violation because, as he reasoned, "[i]f due process were denied every time local officials blundered, then any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983."²²¹ According to Posner, while the factual narrative "deepen[s] [the court's] sympathy for this unfortunate family and bolster[s] the plaintiffs' contention that the defendants have mishandled the whole business [the facts] also show

220. *Ellis v. Hamilton*, 669 F.2d 510, 511-12 (7th Cir. 1982).

221. *Id.* at 514.

that the plaintiffs really did, and still do, have remedies under Indiana law."²²²

A second example of Posner's narrative prowess in his opinions during this nascent period in his judicial career is extracted from an employment discrimination suit brought by a black man, which involves interesting issues of reverse racial discrimination and sexual discrimination.²²³ Presenting the narrative from the standpoint of plaintiffs' evidence at trial, because of the trial court's conclusory non-foundational dismissal order in the bench trial,²²⁴ Judge Posner set the stage for his subsequent legal analysis for the court, which reversed and remanded the case for a new trial.²²⁵ In prose that suggests the Dickensian random interconnectedness of multiple characters, and also hints at Kafkaesque alienation and injustice in the face of meaningless procedures. Judge Posner wrote:

The plaintiff, Carl Rucker, was a supervisor for the defendant, the Higher Educational Aids Board, a Wisconsin state agency that provides counseling services to disadvantaged youths. Rucker, who is black, contends that the Board fired him because he opposed the efforts of his supervisors to discriminate on racial and sexual grounds against a white woman who worked for the Board, Mary Phillips. Thus he invokes 42 U.S.C. § 2000e-3(a), which so far as relevant here forbids an employer to discriminate against an employee because "he has opposed any practice made an unlawful employment practice" by Title VII, including, of course, racial and sexual discrimination.

At trial Rucker presented evidence in support of the following facts. He had been hired by the Board in 1973, had been rapidly promoted, and in 1976 had received an Exceptional Performance Award from the Board's chief executive officer. Also in 1976 Miss Phillips who had been working as a typist at the Board, applied for a professional position as a counselor in an office where Rucker would be her supervisor. Rucker's immediate supervisor, Spraggins, also a black man, told Rucker that he wanted to prevent Miss Phillips from getting the job as counselor because she had not been "cooperating," which Rucker interpreted as referring to the fact that Spraggins in his presence had once placed a hand on Miss Phillips' breast and she had pushed it away. Spraggins asked Rucker to write a memorandum to him stating that the local black community did not want a white employee to serve them as a counselor. Rucker refused. Spraggins then had Rucker attend a meeting that Spraggins had arranged with

222. *Id.* at 515.

223. *See Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982).

224. *See id.* at 1183.

225. *See id.* at 1184.

two black ministers, who told Rucker: "You're going to have to get a black woman and put her on that job. It's as simple as that." On the way out of the meeting one of the ministers said to Spraggins that he had better get rid of that "nigger," meaning Rucker. After this Spraggins repeated his request to Rucker to write the memorandum about community feeling, and Rucker again refused.

Shortly afterward, Miss Phillips was appointed to the counselor's position, initially on a six-month probationary basis. During this period she claimed to be having further problems with Spraggins and wrote him complaining about his hostile attitude toward her, which she summarized in the phrase "vile crap." He wrote back accusing her of lying and other misbehavior, and she responded by filing with the Board a written grievance protesting Spraggins' conduct toward her. Rucker then wrote a memorandum to Spraggins in which he defended Miss Phillips and in addition stated, "I have good reason to believe that the charges . . . forwarded to you from Mary Phillips . . . are true." This was on December 28, 1976. Shortly afterward, in a meeting with the Board's chief executive officer, Rucker was given to understand that he should give Miss Phillips a poor evaluation so that she would not receive permanent status at the end of her probationary period. He refused and instead, on January 18, 1977, submitted a written evaluation in which he found her to be qualified for a permanent appointment. Three weeks later Rucker was suspended from his job on a variety of charges, and the next day he filed with the Equal Employment Opportunity Commission a complaint that his suspension was in retaliation for his refusal to be a party to proposed discrimination. A month later he was fired; Miss Phillips had meanwhile received her permanent appointment.²²⁶

A third illustration of Posner's facility in writing compelling, interesting and pithy narrative in his early judicial opinions during 1982 is contained in *Hixon v. Sherwin-Williams Co.*²²⁷—a diversity suit involving principles of state tort law emanating from a comedy of errors involving attempts to fix the linoleum kitchen floor owned by a married couple. In vivid, forceful, simple and elegant language, Judge Posner wrote:

Mr. and Mrs. Chess, who are not parties to this litigation, sustained several hundred dollars in water damage to the kitchen floor of their home in Indiana. Their homeowner's insurer, American States Insurance Company, a nonresident corporation, hired a local contractor, Marv Hixon, to install a new linoleum floor in the kitchen. Too busy to attend to the contract himself, Hixon subcontracted the job to the Sherwin-Williams Company, another nonresident

226. *Id.* at 1180-81.

227. 671 F.2d 1005 (7th Cir. 1982).

corporation. Sherwin-Williams is a manufacturer of linoleum and other products rather than a building contractor, but it undertook to install its linoleum in the Chesses' kitchen rather than just sell the linoleum to Hixon for installation. The local office of Sherwin-Williams hired Louis Benkovich to do the installation. Benkovich had been in the linoleum installation business for many years and had done previous jobs for Sherwin-Williams. His reputation was good; people said, "Louie puts in a nice floor." He had never been known to have an accident or otherwise fail to render adequate service. He was self-employed, and was retained by Sherwin-Williams as an independent contractor rather than an employee. Sherwin-Williams did not supervise his work and knew nothing about the particulars of the Chess job beyond the fact that Hixon wanted a new linoleum floor installed.

The new linoleum could not be attached directly to the cement floor beneath it because of dampness; a plywood layer was required between the cement and the linoleum. Benkovich used a glue that happened to be extremely flammable to fasten the plywood to the cement. The label on the can contained explicit and emphatic warnings concerning the flammability of the glue and the importance of good ventilation. Benkovich had never used this brand of glue before; in fact, he had never in his many years as a linoleum contractor fastened a plywood layer to a cement floor. He proceeded to ignore the warnings on the can; he may not even have read them. Instead of opening the windows and turning off the pilot light in the hot water heater in the Chesses' kitchen, he closed the windows and left the pilot light on. The glue exploded; and pursuant to its homeowner's policy American States found itself having to indemnify the Chesses for some \$27,000 in additional damage to their house.²²⁸

Posner's narrative structure in this story of comical carelessness suggests a plot theme of how seemingly small acts and omissions can lead to catastrophic losses. A close reading of Posner's account of the facts of the case is remarkable in two respects. First, he cuts to the quick of the dispute by a straightforward, informal recitation of the relevant evidence. Unlike many appellate opinions, Posner does not provide an excessively detailed chronology; does not quote at length from documentary evidence (insurance policies for example); and passes on the easy temptation to comment at length on the entire corpus of evidence. Second, Posner's narrative is memorable and imaginatively-crafted; his story reminds the reader of the analogous universal plot themes of "Wretched Excess" (whereby "life sometimes throws us a

228. *Id.* at 1006.

curve that we can't handle" that leads to an unraveling)²²⁹ and "Metamorphosis" (all about "change"—both physical and emotional).²³⁰

d. Intense Doctrinal Scrutiny

Right from the start of his service on the federal appellate bench, Judge Posner wrote opinions that are unusual and noteworthy for their penetrating analysis and criticism of prevailing legal doctrines.²³¹ By way of illustration, his early 1982 opinions provide rich, clarifying, and fact-sensitive insights on a panoply of legal doctrines including pendent jurisdiction and pendent party jurisdiction in federal diversity suits;²³² due process notice and hearing procedures in government property deprivations;²³³ *Hadley v. Baxendale* limitations on consequential damages in contract actions;²³⁴ avoidable consequences limits in tort actions;²³⁵ the foreseeable consequences rule in negligence suits;²³⁶ the concept of ancillary jurisdiction;²³⁷ the equitable nature of class actions;²³⁸ and affirmative action by employers.²³⁹

229. RONALD B. TOBIAS, 20 MASTER PLOTS 209 (1993).

230. *Id.* at 146.

231. As explained by one commentator in considering the corpus of Posnerian opinions during the Eighties and early Nineties:

He asks why certain doctrines exist, what function they serve, whether they still serve that function, and what might be gained by discarding the doctrine for something else. He explains and reveals the reasoning undergirding whatever doctrine he is looking at and only at the end cites cases to support his position. With each case he reasons through the doctrine and then applies facts, always questioning the usefulness of the doctrine. This is not to say that he is quick to discard precedent when he disagrees with it. Firm principles dictate the extent to which a lower court can ignore Supreme Court precedent, and Posner adheres strictly to them.

DOMNARSKI, *supra* note 14, at 134.

232. *See Hixon*, 671 F.2d at 1007-09.

233. *See Sutton v. City of Milwaukee*, 672 F.2d 644, 645-47 (7th Cir. 1982).

234. *See Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955-57 (7th Cir. 1982).

235. *See id.* at 957-58.

236. *See id.* at 958. A slice of Posner's analysis on this doctrinal issue stands out from the run-of-the-mill standard of appellate opinion writing:

These were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should have more intelligent machines or should install more machines in the cable department, any more than the falling of a platform scale because a conductor jostled a passenger who was carrying fireworks was a prospect that could have influenced the amount of care taken by the Long Island Railroad. *See Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *cf. Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 80-84, 117 N.E.2d 74, 78-80 (1954).

Id.

237. *See Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 452 (7th Cir. 1982).

238. *See Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir. 1982).

239. *See Donovan v. Ill. Educ. Ass'n*, 667 F.2d 638, 640 (7th Cir. 1982).

e. Illuminating Economic Insights

Given Richard A. Posner's remarkable quantitative background and prior scholarly predilection to employ economic analysis in solving legal problems,²⁴⁰ it was not surprising for Judge Posner to use "the language of economics"²⁴¹ in his early judicial opinions.

Three striking instances of his extraordinary economic reasoning contained in his first quarter 1982 judicial opinions are instructive. In the first instance—in a case examining whether an explosion occurring from glue vapors in the course of a contractor's laying of a linoleum kitchen floor was an "inherently hazardous activity," thereby, being an exception to the independent contractor rule of no vicarious liability—Posner deployed the following economic prose:

This case is not within the exception to the rule for inherently hazardous activities. The more hazardous an activity is, the higher is the cost-justified level of care; and if it is hazardous enough, the principal should take his own precautions even though he does not supervise the details of the independent contractor's work. But there is nothing hazardous about laying a linoleum floor. It becomes so only if the installer misuses one of the inputs, the glue. This kind of hazard is present in almost all construction work and does not make construction a hazardous activity. If the presence of a hazardous input made the principal liable for the torts of his independent contractors, then if the employee of a building contractor sawed off his finger while repairing a house the owner of the house would be liable, at least if it turned out that the accident had been due to negligence by the contractor. The exception would swallow the rule.²⁴²

In the second instance—a case involving the question of whether federal courts should create a federal common law for landlord-tenant disputes involving federal agencies—Judge Posner applied various economic concepts, and scholarly economic citations, in aid of his reasoning:

One argument in favor of applying federal common law might be that applying state law would increase the cost of the federal program. This argument is superficially applicable to the present case, because if [the Landlord] is allowed to terminate the lease the [United States

240. See generally DOMNARSKI, *supra* note 14, at 129-33.

241. *Id.* at 131.

242. *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1009-10 (7th Cir. 1982) (citations omitted).

Postal] Service will lose the benefit of the low rent fixed in 1964. But the advantage would be transitory. Knowing that they would have fewer rights under federal leases than state law (if applicable) would have given them, Indiana landlords would in the future drive harder bargains with the Postal Service. Concretely, the more difficult a lease is to terminate, the higher will be the rent demanded by the landlord; there will be no net saving to the tenant in the long run. And even if the Postal Service could somehow gain a permanent advantage by having its leases in Indiana governed by federal common law rather than by state law, this would merely shift some of the cost of postal service from the users of the mails and from the federal tax payer to Indiana landlords. No net increase in the nation's welfare can be assumed from so random a change in the distribution of the costs of postal service.²⁴³

In my final illustration of Judge Posner's dynamic and piercing use of economic analysis in the course of his early 1982 opinions, we see how he is able to lucidly—even for non-economists—apply cost-benefit analysis to decide “whether due process requires notice and hearing before government may deprive a person of property”²⁴⁴ in the context of police towing of illegally parked cars. Posner wrote:

[The cost benefit test mandated by the Supreme Court] require[s] comparing the benefit of the procedural safeguard sought, which is a function of the value of the property interest at stake and the probability of erroneous deprivations if the safeguard is not provided, with the cost of the safeguard. The benefit of the safeguard can be thought of as the product of multiplying the value of the property interest by the probability that that value will be destroyed by a government error if the safeguard is not provided. Quantification will rarely be possible but expressing mathematically the relationship between the value of the interest and the probability of its erroneous destruction may assist in thinking about the tests—which, being general, are as applicable to the towing of automobiles as to the termination or reduction of social security benefits

On the benefit side of the ledger in this case, the first thing to be noted is that the property interest is a slight one. It is not the car itself but the use of the car for a short period, usually a few hours, that is at stake.

Second, the additional safeguard of pretowing notice and opportunity to be heard is not required in this case to prevent frequent errors.

243. *Powers v. U.S. Postal Service*, 671 F.2d 1041, 1044 (7th Cir. 1982).

244. *Sutton v. City of Milwaukee*, 672 F.2d 644, 645 (7th Cir. 1982) (“The starting point for our analysis is *Matthews v. Eldridge*, 424 U.S. 319, 335 . . . (1976), where the Supreme Court announced a simple cost-benefit test of general applicability . . .”).

The determination that a car is illegally parked is pretty cut and dried. Police officers make mistakes, of course, but in giving out parking tickets not very many—far fewer than in the case of moving violations. Rarely would a car's owner be able to convince an impartial arbiter that his car really was not illegally parked and so should not be towed; few would be the occasions, therefore, when notice and an opportunity to be heard in advance of towing would prevent an unjust deprivation of a property interest. Since the procedural safeguard sought here would avert few errors, and those of small magnitude in terms of cost to the car's owner, the benefits of the safeguard would be very small.

We turn to the costs of the safeguard. They are not in this case limited, as one might expect, to the expense of notice and hearing. There is no way that the city or state can notify the owners of illegally parked cars that their cars will be towed and provide them then and there with an opportunity to challenge the lawfulness of the towing. To require notice and hearing in advance is, as the appellees concede, to prevent all towing of illegally parked cars.

The cost of notice and hearing is therefore the cost of abandoning towing as a method of dealing with illegal parking. It is clearly prohibitive, as the district judge recognized, when the illegally parked car is blocking traffic or otherwise causing an emergency, for in that case there is no feasible alternative to towing. When the illegally parked car is not creating an emergency in this sense, the benefits of towing are less. This is by definition: the term "emergency" is a shorthand expression for situations where towing is the only solution to the problem created by an illegally parked car. But we are not prepared to say that the benefits of towing are negligible in the nonemergency case. Parking regulations have a valid purpose; and not only does towing implement the regulations directly, by removing cars parked in violation of them, but the threat of towing deters violations, as every driver knows. Of course there are alternative methods of deterrence, such as heavy fines for illegal parking. But that is equally true with regard to parking violations that create emergencies: they too could be punished more heavily than they are, and there would then be less need for towing. State and municipal traffic officials, who know much more about these matters than federal judges do, have decided that towing is more effective in dealing with parking violations of all kinds than just jacking up the fines further would be, and we cannot say that this judgment is not a reasonable one.

We conclude that the benefits of towing illegally parked cars even when they are not creating an emergency—benefits that would be sacrificed by requiring notice and an opportunity to be heard in advance of towing—outweigh the very modest costs entailed by forgoing procedural safeguards that would be merely additive to the

post-towing procedural safeguards to which the parties have stipulated. We hold, therefore, that it is not a violation of the due process clause to tow an illegally parked car without first giving the owner notice and an opportunity to be heard with respect to the lawfulness of the tow.²⁴⁵

f. Miscellaneous Stylistic Virtues

Posner's early opinions are impressive for possessing several additional vigorous qualities having to do with his budding, informal, personalized judicial opinion style. Specimens of his emerging opinion style embedded in his sixteen opinions, penned for the Court of Appeals during the first three months of 1982, are easy to find, although less pronounced than in his later judicial opinions.²⁴⁶ Consider some of these examples. First, an analogy:

[In a Ninth Circuit case] a helicopter was seized to coerce payment of a debt to the government. The helicopter was not illegally "parked," a menace to public safety, or otherwise "in the way" of some valid government project; it really was a hostage. The Milwaukee police do not seize a person's legally parked car in order to make him pay off his prior unpaid parking tickets²⁴⁷

Second, an epigram: "Cenco's evidence tended to show that in the early stages of the fraud Seidman had been careless in checking Cenco's inventory figures and its carelessness had prevented the fraud from being nipped in the bud."²⁴⁸ Finally, an historical allusion: "[b]ecause of the confusing Watergate aura that the counterclaim would have cast over the antitrust suit if tried with it, the district judge would, he said in his opinion dismissing the complaint, have ordered separate trials."²⁴⁹

A poignant instance of Posner's penchant for hypotheticals in his opinions is found in a case about a battle between county officials' and relatives' claims over the adoption of children. Posner opined:

We have no doubt that if welfare caseworkers, acting so precipitately as to prevent any recourse to the protective legal machinery of the state, barged into a couple's home, seized their children, sequestered them in a secret place, and put them up for adoption without

245. 672 F.2d 644 at 645-46 (citations omitted).

246. Cf. DOMNARSKI, *supra* note 14, at 127-29.

247. 672 F.2d 644 at 648. See also *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173 (7th Cir. 1982) ("For this is not a case where a district judge tries to rip open a settlement that has become final.").

248. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 452 (7th Cir. 1982).

249. *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 960 (7th Cir. 1982).

notifying the parents, they would be guilty of violating 42 U.S.C. § 1983, no matter how regular the adoption proceeding on its face. We do not think any exotic constitutional doctrine—not even the ubiquitous oxymoron “substantive due process”—would be necessary in order to reach that result. It is plain to us that the “liberty” protected by the due process clause of the Fourteenth Amendment includes the right to the custody of one’s minor children and that it would be a deprivation of that liberty without due process of law for persons acting under color of state law permanently to separate the children from their parents without notice and hearing. We have to decide how close this case is to that one.²⁵⁰

Moreover, in the adoption case, just mentioned, we can discern Judge Posner’s noteworthy use of simile: “on this appeal we must . . . accept as true that Mrs. Ellis was *in loco parentis* to these children when the defendants took them away from her; and we are reluctant to conclude that a great-aunt, an adoptive grandmother, and a *de facto* mother and father all rolled up into one does not have a liberty interest sufficiently like that of a parent to support an action under section 1983.”²⁵¹ Judge Posner’s early judicial opinions also reflect a love for colorful slang as exemplified in an employment discrimination case involving possible conspiracy between a state public agency supervisor and members of the local religious community giving input on the agency’s mission: “[a]s a detail, we note the preference of the local black community for a black counselor was not . . . conceded by [the plaintiff] . . . [since h]is evidence was that the ministers were not speaking for the community but were in cahoots with [the supervisor].”²⁵² For an early Posnerian aphorism: “the business of the courts is to do justice rather than to spread good feeling.”²⁵³ For an instance of Posner’s focus on human motivation and the law:

We understand, of course why the [aliens] sought habeus corpus after they were arrested and put in jail—they wanted their freedom. The motive for this appeal is less easily understood since the petitioners are now free on bond. . . . From the briefs and oral argument on this appeal, however, it appears that the petitioners are after bigger game than being relieved from what may well be the trivial burdens associated with their bond status. What they principally want is for the district court to enter an order barring the INS from using in the

250. *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982). For another striking example of Posner’s use of hypotheticals in his early opinions see *Arias v. Rogers*, 676 F.2d 1139, 1143 (7th Cir. 1982) (various hypothetical extremes of INS detention of suspected illegal aliens).

251. *See id.* at 513.

252. *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982).

253. *Id.* at 1182.

deportation proceedings any admissions or other evidence (perhaps even their identity) traceable to their arrests²⁵⁴

g. Some "Dark Side" Stylistics

Even in Posner's very first batch of judicial opinions, there are subtle hints of prose qualities that some critics might label as being undesirable.²⁵⁵ By way of an explicit hint, the concurring opinion of Judge Harlington Wood, in *Rucker v. Higher Educational Aids Board*,²⁵⁶ is instructive. Judge Wood, obviously upset at the way Judge Posner's opinion for the court personally slammed the trial court judge, stated: "I believe that [the trial court judge's] findings need some clarification, but they need only be repaired, not junked."²⁵⁷

On an implicit level, some of the stylistic qualities that make Posner's early appellate opinions praiseworthy can, when viewed from other perspectives, be considered undesirable. Thus, some of Posner's free-wheeling economics analysis²⁵⁸ might appear to be speculative and untethered to the facts of the case; instances of Posner's reference to the issues of "first impression"²⁵⁹ could appear to be egotistical and gratuitous; cases of Posner's intense scrutiny of the underpinnings of settled legal doctrine²⁶⁰ might be interpreted as being presumptuous and out of line.

C. Runs Battled In: The Rest of Posner's 1982 Opinions for the Court—Thoughts on the "Beautiful" and the "Ugly"

During the remaining nine months of 1982, Judge Posner's judicial opinion style continued to evolve along the trajectory established during his first hundred days as a federal judge.²⁶¹ Of the fifty-nine opinions that he authored for the Seventh Circuit during the remaining nine months of what I have called his rookie season, there are five opinions

254. *Arias v. Rogers*, 676 F.2d 1139, 1141-42 (7th Cir. 1982). For another incisive instance, in the early Posner opinions, of probing human motivation see *United States v. Lewis*, 671 F.2d 1025, 1027 (7th Cir. 1982) (examining motive of taxpayer in not filing tax return).

255. Cf. Chicago Council of Lawyers, *supra* note 20 and accompanying text (criticism by members of the Seventh Circuit Bar).

256. See 669 F.2d 1179 (7th Cir. 1982).

257. *Id.* at 1184 (Wood, J., concurring).

258. See *supra* notes 240-45 and accompanying text.

259. See *supra* notes 209-11 and accompanying text.

260. See *supra* notes 231-39 and accompanying text.

261. See *supra* notes 178-260 and accompanying text.

that deserve extended favorable commentary.²⁶² These are—

262. See *infra* notes 268-326 and accompanying text. For "honorable mentions" of beautiful judicial opinion style practiced by Posner during the last three quarters of 1982 see, for example, *United States ex rel. Stevens v. Circuit Court*, 675 F.2d 946, 948 (7th Cir. 1982) (masterful synthesis of criminal law on double jeopardy, followed by a focused "comparison of inconveniences" between a state criminal defendant seeking habeas corpus relief after a guilty plea as to some counts and the state in trying him on the remaining counts); *United States v. Boulahanis*, 677 F.2d 586, 587 (7th Cir. 1982) (vivid, concise, and humorous narrative of FBI sound recording of criminal defendants which yielded a tape of defendants using "language free from any shade of ambiguity that if he did not pay them . . . for allowing gambling . . . they would shut it down, while if he did pay they would not only 'terrorize nobody more in here' but would beat up anyone else who was trying to extort money from [him]."); *Hamilton v. Nielsen*, 678 F.2d 709 (7th Cir. 1982) (eloquent and succinct exposition of facts, federal subject matter jurisdiction in tort action against executors for alleged negligence, prediction of Illinois tort principles in federal diversity suit against estate executors); *Bart v. Telford*, 677 F.2d 622, 623, 625 (7th Cir. 1982) (insightful discussion of "questions relating to the First Amendment rights of public employees who run for public office" in the context of a civil rights case against the Mayor of Springfield, Illinois; judicious policy-focused assessment, involving "the court's weighing [of] general considerations rather than by its listening to witnesses" in deciding that a required leave of absence for the candidate-employee was justified; wry comment on allegation that the Mayor held the plaintiff "up to ridicule for bringing a birthday cake to the office on the occasion of [another employee's birthday]", with Posner noting that "a certain air of the ridiculous hangs over the harassment allegations, in particular . . . regarding the birthday cake."); *Johnson v. Miller*, 680 F.2d 39, 41-42 (7th Cir. 1982) (trenchant pragmatic analysis of the efficacy of a civil rights action brought against police officers and a bank alleging wrongful arrest, with Posner's opinion for the court noting: "We resist the temptation to reach [the] conclusion [that there is no Fourth Amendment violation] by the casuistic route of deeming a warrant to be valid on its face even if it contains discrepancies," rather "[w]e place our decision on [the] more practical ground [that] [t]he execution of a warrant by an officer who if he were more careful might have noticed that the warrant had been issued by mistake is not the stuff out of which a proper federal case is made."); *Illinois v. General Electric Co.*, 683 F.2d 206, 216 (7th Cir. 1982) (elegant and nuanced statutory analysis of a federal environmental statute, the Clean Air Act, which while giving states the power to promulgate clean air measures more stringent than federal standards did not allow a state to ban the importation of radioactive wastes from another state since "while one effect of the [state statute] may be to reduce [air] emissions by eliminating interstate shipments to the facility, that is not enough to make [the state statute] a rational pollution-control measure, especially when, for aught that appears, the facility emits no radioactivity into the air" and ended by stating, "[w]e cannot believe that Congress in promulgating the Clean Air Act Amendments meant the states to have carte blanche to enact any statutes . . . that might as a side-effect reduce the level of radioactive emissions in the state, regardless of how much the statute . . . disrupted the federal atomic energy program . . . [including] disposing of nuclear wastes."); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (incisive analysis, based on creative use of hypotheticals, of error of lower court in allowing the City to bring an action against a cable television company alleging breach of a franchise contract while seeking a declaration that the Federal Communications Commission regulation was invalid, noting "Peoria's action . . . to declare the FCC's rule invalid was brought in the wrong court at the wrong time against the wrong party."); *Sulie v. Duckworth*, 689 F.2d 128, 130 (7th Cir. 1982) (magnificent use of sarcasm and deep analysis of human nature in rejecting criminal defendant's habeas corpus petition alleging that his constitutional right to remain silent was infringed by allowing a police officer to testify that the petitioner's sanity was partially proven by the fact that he asked to speak to a lawyer when arrested, without having Miranda rights read to him, Posner's opinion for the court noting: "In deciding whether to apply this enforcement device in the present case, we have to consider first how much the exercise of the right to remain silent would be deterred if a suspect knew that a request for a lawyer could be used as evidence of his sanity. Not much, in our opinion."); *Menora v. Illinois High School Ass'n*, 683 F.2d 1030, 1033 (7th Cir. 1982) (extraordinary and particularized use of economic analysis in examining the constitutionality, under First Amendment free exercise principles, of an athletic association's rule forbidding basketball players to wear hats or other headgear while playing, noting that "[f]ree exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion

plain and simple—my stylistic favorites during this time segment. These Posnerian opinions for the court embody remarkable opinion style: they are riveting; they fairly, efficiently, and accurately discuss the relevant facts and law; and they sparkle—in different stylistic ways—with erudition, wisdom, wit and clear reasoning. They are—from my standpoint as a judicial opinion aesthete—objects of beauty. In discussing why I think these opinions are beautiful I will not dissect each case or seek to describe every attractive stylistic feature. Rather, my review will be synoptical, providing a diversified, balanced, evolutionary, big-picture view of the unique, seminal Posnerian opinion style.

On the other hand, of the nearly five dozen opinions for the court written by Judge Posner during the last three quarters of 1982, there is only one opinion that I believe deserves extended unfavorable commentary because of significant stylistic flaws. This opinion is a prominent example of what I call Posner's ugly opinions.²⁶³

unreasonably costly," thus Orthodox Jewish basketball players are not necessarily entitled to wear a pinned yarmulke while playing, in light of legitimate safety concerns of preventing wearing of headgear that might fall off in the heat of play, when other, safer, forms of headcovering may reasonably be available that would conform to Orthodox Jewish religious beliefs); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660 (7th Cir. 1982) (masterful, clear, scholarly and concise explanation of basic anti-trust legal principles involving suit alleging violations of the Sherman Act); *Muscare v. Quinn*, 680 F.2d 42, 44 (7th Cir. 1982) (seasoned, practical, trenchant, eloquent and legal factual analysis of proportionality limitations in setting limits to the endless litigation of attorneys' fees awards in civil rights litigation with a classic Posnerian use of a metaphor that cut to the quick of the controversy: "For rather obvious practical reasons we are loath to disturb a ruling by a district judge on a request for second-round attorneys' fees. The consequence if we should reverse and remand for an award of additional fees is all too predictable: however little the plaintiff is awarded on remand he will move the district court to award him attorneys' fees for the time spent in prosecuting this appeal, and if the district court denies his motion he will be back up here. Every civil rights litigation will be like a nest of Chinese boxes. The outside box is the litigation of the civil rights issue itself. Within it is the litigation over the fees incurred in the litigation over the merits—ordinarily a lesser litigation, as our metaphor implies, though in this case the stakes in each of the two rounds of fee litigation have been greater, at least in monetary terms, than the stakes of the original civil rights litigation."); *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982) (masterful, scholarly and concise analysis of the probate exception to federal diversity jurisdiction in an action by residents of Rumania against Illinois defendants for imposition of a constructive estate, with Posner observing that "[t]he probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Id.* at 713.); *W.W. Grainger, Inc. v. NLRB*, 677 F.2d 557, 559-60 (7th Cir. 1982) (concise, jugular analysis of human motivation in conjunction with interpreting labor warning policies of NLRB, with Posner reasoning that after an employee had been discharged and his former supervisors, with the company lawyer, attempted to interview the ex-employee for an upcoming hearing, the employee "had no incentive to ingratiate himself with the interviewers. So there was no carrot. Neither was there stick. Nothing . . . could have intimidated Jaske If Jaske had been intimidated, he would have consented to be interviewed; he would not have fobbed off his questioners with a lie").

263. See *infra* notes 327-38 and accompanying text. For "dishonorable mentions" of ugly opinion style exhibited by Posner during the last quarter of 1982, his rookie season on the bench, see, for example, *CBI Industries, Inc. v. Horton*, 682 F.2d 643 (7th Cir. 1982) (in a securities law civil suit against one corporate director for recovery of short-swing profits allegedly realized by the director, Posner's use of economic

Before undertaking this discussion of "beautiful" and "ugly" Posnerian opinions for the Seventh Circuit, I need to briefly mention the structure of the rest of this article. In the final portion of this article—before offering some overarching conclusions and a call for a more robust aesthetic theory and praxis of judicial opinions based on a richer appreciation of judicial style²⁶⁴—I discuss this style of Judge Posner's isolated dissenting, concurring and chamber opinions during his rookie season as a federal judge.²⁶⁵ I shall admit to something in advance of this discussion; like Wendy Steiner, Professor of English at the University of Pennsylvania and the Director of the Penn Humanities Forum, writing in a recent article in *The American Scholar*²⁶⁶ about literary criticism, in general, I offer my "subjective preference" on matters of judicial opinion style and "have given up on being . . . a scientist" (if I ever was one) of the aesthetics of judicial opinions. I, therefore, heartily concur with Professor Steiner's admission:

It has taken me a long time to admit that the thrust of criticism is the "I like," and whatever expertise I have accumulated conspires in this admission. The authority of one's institution of higher learning, one's

analysis is hypertechnical, overly-intellectual, confusing and gratuitous, for example Posner's dicta that "[t]hough some economists believe that emotional relationships within the family can be expressed in economic terms and, presumably, monetized, we doubt that the framers of section 16(b) would have wanted to complicate enforcement of the statute to this degree merely to make an already Draconian strict liability statute still more Draconian." (citation omitted)); *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982) (in bankrupt common carrier suit against a former shipper seeking recovery of alleged undercharges of approximately \$124,000, Posner's reversal of the district court summary judgment in favor of a shipper, based on his insistence that despite an identical tariff with the same common carrier and another shipper which the ICC had declared as unreasonable in an ICC decision—thereby allowing judicial notice of the decision—a separate administrative action be brought before the ICC by the shipper was hyper-technical, and surprisingly unrealistic); *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) (in complex copyright and intellectual property case involving action by television broadcasting company to enjoin telecommunications common carrier from retransmitting its copyrighted television program into cable television system customers after stripping the vertical blanking interval of Teletext information, Posner's opinion for the court was sloppy and confusing, using imprecise language that had to later be defended in a statement—probably also authored by Posner—rejecting a petition for rehearing with suggestion for rehearing en banc); *Federal Deposit Insurance Corp. v. Braemoor Assocs.*, 686 F.2d 550 (7th Cir. 1982) (prolix and overly-intellectual discussion of subject matter jurisdiction before analysis of the merits of the dispute); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (short-shrift factual analysis in Posner's opinion affirming the dismissal of a federal civil rights-based, wrongful death suit on summary judgment against private physicians and a state mental hospital; Posner's analysis did not give a balanced rendition of the facts of the case as persuasively argued by the dissenting opinion of Circuit Judge Harlington Wood; Posner's analysis also failed to distinguish that prior Supreme Court precedent in a case was "narrowly written to apply to a parole release," not a state mental hospital release, as pointed out by Judge Wood's dissent); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982) (a prolix, overly-intellectual, dicta-laden case where Posner unnecessarily "shows off" his knowledge of anti-trust law).

264. See *infra* notes 390-407 and accompanying text.

265. See *infra* notes 339-89 and accompanying text.

266. Wendy Steiner, *Practice Without Principle*, 68 AM. SCHOLAR, Summer 1999, at 77.

academic credentials, one's ever-increasing experience may establish "objectively" one's claim to being an expert, *but at the heart of any critical act is subjective preference. To like, to find important, at this time and in such-and-such a situation: this is the essence of the critical act.*²⁶⁷

1. Posner's Beautiful Opinions

Of the fifty-nine opinions written by Posner for the court during the last nine months of his rookie season, five opinions are what I deem to be, from a holistic perspective, stylistically beautiful.

a. *The Tale of the Injured Tugboat Cook*

In *O'Shea v. Riverway Towing Co.*,²⁶⁸ Judge Posner melds a compelling narrative with pertinent economic insights in resolving the key issue relating to the computation of the plaintiff's lost wages. At the outset of the opinion he succinctly frames the questions presented: "[t]his is a tort case under the federal admiralty jurisdiction. We are called upon to decide questions of contributory negligence and damage assessment, in particular the question—one of first impression in this circuit—whether, and if so how, to account for inflation in computing lost future wages."²⁶⁹

Posner devotes over one full page of the Federal Reporter to the sorry story of Margaret O'Shea—"a 57-year-old woman who weighs 200 pounds (she is five foot seven)"²⁷⁰—who "was coming off duty as a cook on a towboat plying the Mississippi River."²⁷¹ As described in the opinion for the court, Mrs. O'Shea was forced to use a catwalk, in lieu of climbing a seawall without a ladder, "the top of which was several feet above the boat's deck,"²⁷² in disembarking from a harbor boat bringing her ashore from the tug. After climbing a ladder to the catwalk, she was told by a deckhand to "jump [down three feet from the catwalk to the top of the seawall] and that the men who had already disembarked would help her land safely."²⁷³ Mrs. O'Shea "did as told,

267. *Id.* at 81 (emphasis added).

268. 677 F.2d 1194 (7th Cir. 1982).

269. *Id.* at 1196.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

but fell in landing, carrying the assisting seamen down with her, and broke her leg."²⁷⁴

Judge Posner's initial analysis of the facts in *O'Shea*, as a prelude to his legal discussion, advanced what Professor James Boyd White referred to in the Chicago Law Review Colloquium as a "claim of meaning."²⁷⁵ In this regard, Posner framed the pivotal legal issue of the case as what the law expected Mrs. O'Shea to do, in seeking possible further employment, after her serious leg injury. Posner opined that "[t]he question is not whether Mrs. O'Shea is totally disabled in the sense, relevant to social security disability cases but not tort cases, that there is no job in the American economy for which she is medically fit."²⁷⁶ Rather, "[I]t is whether she can by reasonable diligence find gainful employment, given the physical condition in which the accident left her."²⁷⁷ Then, Posner's opinion tells the story of Mrs. O'Shea in such a way that it, in Professor White's parlance, "connects the case with earlier cases [and] the particular facts with more general concerns."²⁷⁸ Posner's rendering of this claim to meaning is attractive and forceful. He states:

Here is a middle-aged woman, very overweight, badly scarred on one arm and one leg, unsteady on her feet, in constant and serious pain from the accident, with no education beyond high school and no work skills other than cooking, a job that happens to require standing for long periods which she is incapable of doing. It seems unlikely that someone in this condition could find gainful work at the minimum wage. True, the probability is not zero; and a better procedure, therefore, might have been to subtract from Mrs. O'Shea's lost future wages as a boat's cook the wages in some other job, discounted (i.e., multiplied) by the probability—very low—that she would in fact be able to get another job. But the district judge cannot be criticized for having failed to use a procedure not suggested by either party. The question put to him was the dichotomous one, would she or would she not get another job if she made reasonable efforts to do so? This required him to decide whether there was a more than 50 percent probability that she would. We cannot say that the negative answer he gave to that question was clearly erroneous.²⁷⁹

After resolving the linchpin issue in favor of Mrs. O'Shea, Judge Posner engaged in nearly four pages of closely-reasoned law and

274. *Id.*

275. White, *supra* note 17, at 1367; *see supra* notes 84-86 and accompanying text.

276. 677 F.2d at 1197.

277. *Id.*

278. White, *supra* note 17, at 1367-38; *see supra* note 86 and accompanying text.

279. 677 F.2d at 1197.

economics analysis to resolve the tricky question of how to account for inflation in computing lost future wages.²⁸⁰ The way that Posner accomplished this task was to weave a seamless web of logic and analysis utilizing the following stylistic techniques: analogy,²⁸¹ computational example,²⁸² case comparison,²⁸³ aphorism,²⁸⁴ and gentle admonition.²⁸⁵

b. The Case of the Crafty Lender

Judge Posner's opinion for the court in *In re Holding Co.*,²⁸⁶ is a splendid example of statutory construction in the face of scant legislative history and caselaw. His reasoning process—gracefully and succinctly contained in only two and a half printed pages—started by stating the relevant facts involving a bankruptcy case. The district court judge had dismissed as moot an appeal by the creditors' committee from the bankruptcy judge's approval of a loan to the debtor which involved a grant of special post-petition priority to Chase Manhattan Bank. Posner's rendition of the facts established below portrayed the efforts of Chase, after the filing of the bankruptcy petition, to grab as much of the bankruptcy estate as it could, in spite of the competing pre-petition claims of other creditors:

Before Wisconsin Steel (as we shall refer jointly to the affiliated corporations that are the bankrupts in this case) went bankrupt, the Chase Manhattan Bank had loaned it money secured by a lien on inventory and by a bank account that the company maintained with Chase. Wisconsin Steel defaulted, and Chase set off against these defaults the funds in the account. Wisconsin Steel was accustomed to paying its employees with checks drawn on this account. Chase's set-off caused those checks to bounce, which induced Wisconsin Steel to petition for protection under Chapter 11 of the Bankruptcy Code. The union representing Wisconsin Steel's workers filed a complaint in the bankruptcy court seeking payment to its members of their

280. *See id.* at 1198-1201.

281. *See id.* at 1198 ("If a man who had never worked in his life graduated from law school, began working at a law firm at an annual salary of \$35,000, and was killed the second day on the job, his lack of a past wage history would be irrelevant to computing his lost future wages.").

282. *See id.* at 1199-1201 (applying past wages earned to example of investing money in federal bonds accounting for impact of inflation).

283. *See id.* at 1200 (comparing different circuit court approaches).

284. *See id.* at 1201 ("Unlike many other damage items in a personal injury case, notably pain and suffering, the calculation of damages for lost earnings can and should be an analytical rather than an intuitive undertaking.").

285. *See id.* ("[F]or the future we ask the district judges in this circuit to indicate the steps by which they arrive at damage awards for lost future earnings.").

286. 676 F.2d 945 (7th Cir. 1982).

unpaid wages. Chase was named as a defendant along with Wisconsin Steel. The union claimed that it had a lien on the same inventory on which Chase claimed a lien. Although the bankruptcy court authorized Chase to take possession of the inventory, the union, by picketing Wisconsin Steel, prevented Chase from doing so. Eventually a settlement was reached by which Chase agreed to lend Wisconsin Steel some \$1.7 million in exchange for the union's dropping its suit and allowing the inventory to be removed. The agreement stated that Wisconsin Steel would pay out of the proceeds of the loan \$77,000 to the union to reimburse it for attorneys' fees and other legal expenses incurred in its suit, and the rest (except for some small amounts for various taxes) to the company's employees in settlement of their claims. The agreement further provided that the entire loan was to receive the priority that 11 U.S.C. § 507(a)(3) gives wage claims.²⁸⁷

Next, Posner framed the question on appeal as follows:

[I]f in lending Wisconsin Steel \$77,000 to pay the union's legal expenses Chase was acting in good faith, its priority could not be affected . . . and the issue of validity is therefore moot [b]ut if Chase was not acting in good faith, the Committee was entitled to have the merits of its objection to the grant of priority adjudicated.²⁸⁸

Then, the opinion identified the relevant provision of the Bankruptcy Code that governed the appeal—section 364(e), which provides that a bankruptcy court's post-petition grant of priority does not affect the validity of the priority if it was granted "to an entity that extended such [post-petition] credit in good faith."²⁸⁹ Posner thoughtfully and lucidly offered the following policy rationale underlying the statutory provision:

[This type of] provision[] seeks to overcome people's natural reluctance to deal with a bankrupt firm . . . as . . . [a] lender by assuring them that so long as they are relying in good faith on a bankruptcy judge's approval of the transaction they need not worry about their priority merely because some creditor is objecting to the transaction and is trying to . . . reverse the bankruptcy judge. The proper recourse for the objecting creditor is to get the transaction stayed pending appeal.²⁹⁰

Typical of his skill in going for the jugular issue in a case, Judge Posner wryly noted that the relevant legal standard contained in the

287. *Id.* at 946.

288. *Id.* at 947 (citation omitted).

289. *Id.*

290. *Id.*

Bankruptcy Code “presupposes good faith.”²⁹¹ In the face of “find[ing] neither cases nor legislative history, pertaining either to good faith lenders to bankrupts or to good faith purchasers from bankrupts,”²⁹² Posner brilliantly reasoned from the structure and ostensible purpose of the “good faith” Bankruptcy Code Standard:

Chase argues that so long as the terms of the transaction are not misrepresented to the bankruptcy judge, as they were not here, the creditor may rely on the bankruptcy judge’s order unless it is stayed, no matter how obviously erroneous the order is. But if this is what Congress intended, the words “in good faith” could have been deleted, as it would be perfectly clear even without them that an order obtained from a bankruptcy judge by fraud was ineffective to put the lender who procured the order ahead of other creditors. We assume the statute was intended to protect not the lender who seeks to take advantage of a lapse in oversight by the bankruptcy judge but the lender who believes his priority is valid but cannot be certain that it is, because of objections that might be upheld on appeal. If the lender *knows* his priority is invalid but proceeds anyway in the hope that a stay will not be sought or if sought will not be granted, we cannot see how he can be thought to be acting in good faith.²⁹³

Viewing the union’s claim, underlying Chase’s post-petition loan, “realistically,” Judge Posner cut to the quick, noting that the “claim by the union’s attorneys for time and expenses incurred in prosecuting the union members’ claims for unpaid wages . . . was not entitled to priority over the claims of the general creditors [and, indeed] could not be paid out of the bankrupt’s estate at all.”²⁹⁴ This was so, Posner reasoned, because the pertinent blackletter bankruptcy rule “is that no allowance will be made to a creditor’s attorney for proving his client’s claim.”²⁹⁵

Wrapping up the doctrinal discussion of good faith lending to a bankruptcy debtor, Judge Posner ended the opinion for the Seventh Circuit with a hypothetical flourish, which he then turned into a penetrating syllogism that correctly resolved the case and reversed the district court below:

Where it is evident from the loan agreement itself that the transaction has an intended effect that is improper under the Bankruptcy Code, the lender is not in good faith, and it is irrelevant what the improper purpose is. If the loan agreement had stated that Wisconsin Steel

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 947-48.

295. *Id.* at 948.

would use the proceeds to buy one-way airplane tickets to Brazil for its officers, we do not think Chase would be arguing to us that it had extended credit to the company in good faith and therefore had an untouchable priority. Of course in such a case the general creditors should be able to obtain a stay but we do not think their failure to do so would place Chase's priority beyond the power of judicial correction; otherwise the good faith requirement would be read out of the statute. The present case is less extreme but no different in principle. Just as Chase would not have been a purchaser in good faith if it had bought from Wisconsin Steel property to which it knew the company did not have good title, so it could not be a lender in good faith in extending credit in exchange for a priority that it knew the company could not properly give it since the transaction amounted to taking money out of the pockets of the general creditors to pay lawyers whose claims were not allowable under bankruptcy law at all.

....

As all this must have been as obvious to Chase as it is to us—probably more so—we do not think that the context (settlement of litigation) in which the loan was made and the special priority received casts enough doubt on the forbidden nature of the transaction to rebut an inference of bad faith—that is, knowledge of improper purpose. Nor, finally, are we persuaded by Chase's argument that the priority it received on the \$77,000 was a *sine qua non* of the entire loan transaction—a transaction beneficial to the bankrupt and hence to the general creditors of the bankrupt as well as to Chase—because the union would not have called off its pickets unless it was given its legal fees and unless the union did call off its pickets and thereby allowed Chase to remove the inventory on which it had a lien Chase would not have made the loan to cover the unpaid wage claims. Chase could have paid the union's legal fees out of its own pocket if that was what was required to get the inventory out. Instead it claims a right to force the company's general creditors to pay the union's legal expenses out of their pockets. That is an improper use of the bankrupt's estate, to which the general creditors are the residual claimants. The fact that Chase was a defendant in the suit by the union actually strengthens the inference of bad faith. Chase was not a disinterested lender but a settling litigant that saw an opportunity to reduce the cost of the settlement by putting the union's lawyers ahead of the general creditors of Wisconsin Steel. An extension of credit having such

an ulterior purpose is not in good faith within the meaning of section 364(e).²⁹⁶

c. The Perils of the Greedy Railroad

*Chicago & North Western Transportation Co. (C&NW) v. United States*²⁹⁷ is a high prototype of Posnerian economic analysis through creative and persuasive use of hypotheticals. The case, in essence, boiled down to the appeal by a railroad of the Interstate Commerce Commission's (ICC) order establishing the price for sale of a railroad line between northern Illinois and southern Wisconsin, which the railroad wanted to abandon. Posner opened his opinion for the court by observing that "[t]his case of first impression under the 1980 Staggers Rail Act amendments to 49 U.S.C. § 10905 requires us to decide both statutory and constitutional questions relating to the meaning of the term 'fair market value' applied to an abandoned railroad line."²⁹⁸

The dispute arose because, as Posner incisively observed, C&NW "valued the [proposed abandoned] property as a rail line, as . . . the [Geneva Lake Area Joint Transit Commission (GLA) a consortium dedicated to the preservation of commuter rail service] intended to use it [but] GLA maintained and the [ICC] agreed that the relevant value was the value of the property for nonrail use—the use to which it would have been put had it been abandoned."²⁹⁹

After examining the text of the statute (determining that Congress had not defined the dispositive term "fair market value")³⁰⁰ and the legislative history of the Staggers Rail Act amendments (concluding that the pre-enactment jurisprudence on the subject as well as unenacted bills and subcommittee hearings provided "obscure and conflicting clues [that] do not help us to decide whether Congress would have wanted the [ICC] to consider the value of the Lake Geneva line to GLA in setting the terms of sale"),³⁰¹ Judge Posner looked at what he called "history in a broader sense."³⁰² In this regard, he canvassed the "legisprudence" of railroad abandonment proceedings since the mid-1970s that often worked to the detriment of shippers and commuters.³⁰³ Posner insightfully grasped that Congress had made the policy judgment to

296. *Id.* at 947-48.

297. 678 F.2d 665 (7th Cir. 1982).

298. *Id.* at 666.

299. *Id.*

300. *Id.* at 667.

301. *Id.*

302. *Id.*

303. *See id.* at 667-68.

partially subsidize "public transit authorities and other entities willing either to support or to acquire and operate branch lines after they were abandoned [by railroad companies]." ³⁰⁴ Moreover, according to his reasoning for the court, "Congress did not want the railroads to have any hold-out power in negotiating with entities planning to continue passenger rail service on a subsidized basis" and "[t]hat is why it amended section 10905 in 1980 to allow—indeed require—the [ICC] to fix the price of the sale if the parties could not agree." ³⁰⁵ Posner, therefore, concluded: "The purpose of the amendment would be frustrated if the [ICC] were required to consider the value of the line to the offeror, for that would give the railroad an approximation to what it was able to get . . . under the previous statute." ³⁰⁶

Turning to a series of colorful hypotheticals to test the constitutionality of his interpretation under the takings clause of the Fifth Amendment, Judge Posner provided vivid and helpful perspective on the interpretational question. In his first hypothetical, Posner noted:

The government may not force a railroad to operate a line at a loss for an indefinite period of time and it would seem to follow that if, as here, the right to abandon is conditioned on the railroad's willingness to sell the abandoned line at a price fixed by the [ICC], that price must not fall short of just compensation. If the line had a scrap value of \$1 million, it would not do for the [ICC] to tell the railroad, "we are going to force you to sell the line for \$100,000, and if you don't like that price we will refuse to let you abandon the line until you have lost another \$900,000, at which point you'll cry 'uncle.'" ³⁰⁷

In his second hypothetical, designed to test the takings clause, Posner wrote:

Setting aside measurement problems, we think it irrelevant whether private property is taken for a new use or to continue an old one, and even question whether this is a meaningful distinction. If C&NW owned a hospital that was losing money and had no prospects for profitable operation, and the State of Wisconsin condemned it for a public hospital, C&NW would not be entitled to the value of its property as a hospital. It would have value to the state only because the state could use its taxing powers to force state residents to defray the losses. In these circumstances the change from private to public

304. *Id.* at 667.

305. *Id.* at 668.

306. *Id.*

307. *Id.* (citations omitted).

ownership would be as distinctive a change in the economic character of the hospital as if it had been taken for use as an artillery range.³⁰⁸

Finally, Posner replied to his hospital hypothetical by articulating, and analyzing, a counter-hypothetical:

But to all this it may be replied that GLA, whatever its source of funds, was a potential purchaser of the Lake Geneva line and this shows that the line had a market value which the statute prevented C&NW from realizing. We agree that a buyer's willingness to pay a high price is not an invalid indication of market value just because he is subsidized. The government could not refuse to pay the market value of western farmland that it condemned, merely because the value had been enhanced by governmentally subsidized water projects in the area.

....
This result is required if for no other reason simply to keep the valuation process manageable. But it is not clear that GLA really was a potential purchaser, at least at any price higher than the salvage value of the Lake Geneva line. It is a public entity that has or could easily be given the power of eminent domain, and if it exercised that power the price it would have to pay would be limited to what C&NW could get from other prospective purchasers who did not have eminent-domain power, none of whom would continue the line in rail use.³⁰⁹

Distilling the wisdom from his law and economics analysis, freighted with hypotheticals, Judge Posner in *Chicago & North Western Transportation Co.* concluded his opinion with a legal insight that joined political theory with economic thought:

[The Staggers Rail Act] amendments have given the railroads a faster abandonment procedure than the Fifth Amendment entitles them to and it is reasonable that they should be asked to give up something in return—the opportunity to engross values created by a political process that weights the preferences of railroad passengers [as reflected in federal subsidy legislation] more heavily than the market does.³¹⁰

308. *Id.* at 669.

309. *Id.* at 670 (citations omitted).

310. *Id.* at 771.

d. *The Case of the Fired HUD Employee "Slumlord"*

*Wild v. United States Department of Housing and Urban Development*³¹¹ arose on a set of unusual facts; an employee who was disciplined and ultimately fired by HUD for moonlighting as the manager of his wife's slum properties and letting the properties deteriorate so badly that it became a focus of gang activity.³¹² The legal basis asserted by HUD in firing Mr. Wild was the *HUD Code of Conduct*, which provided in pertinent part, as quoted in Judge Posner's opinion for the court, that a HUD employee

can never have a right of tenure that transcends [sic] the public good. He can properly be a Government employee only as long as it remains in the public interest for him to be one. Public trust and confidence in the integrity of the Government are paramount.³¹³

Judge Posner's controversial and frank opinion for the Seventh Circuit upheld the legal basis of HUD's discharge of its employee.

In the view of Judge Patricia Wald, discussed earlier as part of the synthesis of the Chicago Law Review Colloquium, the gist of Judge Posner's opinion for the court in *Wild* might be cynically interpreted as an exercise in "personal gratification" or an effort to attract attention in "hopes of promotion to higher judicial office."³¹⁴ Wald's realistic insights about the internal workings of appellate courts are also useful in understanding Posner's acerbic opinion; one could not help concluding that Posner was using, in part, caustic prose in order to debunk the views or perceptions of a disfavored colleague or doctrinal foe,³¹⁵ or otherwise attempting to imitate the combative and sarcastic stylistic posture of jurists like U.S. Supreme Court Justice Scalia.³¹⁶

In the Chicago Law Review Colloquium view of Professor Nussbaum, however, the nub of Judge Posner's opinion in *Wild* might be seen as an opinion reflecting "the literary judge/judicious spectator" who is able to "think like a novel reader."³¹⁷ Professor Leflar might label Posner's opinion in *Wild* as primarily concerned about the ironic and "practical

311. 692 F.2d 1129 (7th Cir. 1982).

312. *See id.* at 1131.

313. *Id.* (quoting 24 C.F.R. § 0.735-201(a)).

314. Wald, *Rhetoric*, *supra* note 15, at 1372.

315. *See supra* note 36 and accompanying text. Compare the dissenting opinion of Judge Decker in the case at bar criticizing Posner for his characterization of the HUD employee as a "slumlord," without substantial evidential support. *See Wild*, 692 F.2d at 1134-35 (Decker, S.J., dissenting).

316. *See supra* notes 39-40 and accompanying text.

317. Nussbaum, *supra* note 19, at 1486, 1492.

socio-economic effects"³¹⁸ of allowing a federal HUD employee—charged with helping to adequately house the poor—to continue in his job after public revelations that he was a “slumlord” of property that he managed, on his own time, for the benefit of his wife. Professor Gibson might even be inclined to applaud Posner’s opinion in *Wild* as forcefully engaging in “the expression of life’s complexities in mere man-made words”³¹⁹ verging on the eloquent.

What I have been referring to as the nub or essence of Posner’s opinion in *Wild*—(text that I find breathtakingly delightful with the deployment of creative and vivid language, examples, metaphor and precedent) is as follows:

But where an employee’s off-duty behavior is blatantly inconsistent with the mission of the employer and is known or likely to become known, most any employer, public or private, however broadminded, would want to fire the employee and would be reasonable in wanting to do so; and we find no evidence that Congress intended to deny this right to federal agencies. If an employee of a manufacturer of safes moonlighted as a safe cracker, his days as an employee of that manufacturer would be numbered, even if he scrupulously avoided cracking safes manufactured by his employer. If an officer of a musicians’ union owned a nightclub that employed non-union musicians, because their wages were lower, his days as an employee of the union would be numbered. A customs officer caught smuggling, an immigration officer caught employing illegal aliens, an IRS employee who files false income tax returns, a HUD appraiser moonlighting as a “slumlord”—these are merely the public counterparts of a form of conflict of interest that is not less serious for not being financial, that would not be tolerated in the private sector, and that we do not believe Congress meant to sanctify in the public sector.

It may be replied that all Wild is asking is that the agency be forced to *prove* a reduction of its efficiency due to an off-duty misconduct, rather than being allowed to infer it from the relation between the misconduct and the agency’s mission. But proof of that relation is the substantial evidence that the statute requires; to require more proof would be unnecessary and unrealistic. Without judicial precedent, without persuasive evidence of congressional intent, and in the face of our own contrary precedent . . . we will not force HUD to continue employing a “slumlord” in a responsible position until it can prove, by the cumbersome methods of litigation, what ought to be

318. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 816 (1961). See *supra* note 169 and accompanying text.

319. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 930 (1961). See *supra* note 171 and accompanying text.

obvious—that the credibility and effectiveness of the department are undermined by such discordance between public duty and private conduct.³²⁰

e. The Strange Case of the Longshoreman Who Fell to His Death in the Darkened Hold

Judge Posner's opinion for the court in *U.S. Fidelity Guarantee Co. v. Plovdba*,³²¹ rounds out my favorite cases of Posnerian judicial opinion style during the latter part of his rookie season on the federal appellate judiciary. The procedural context on appeal was one of factual review: whether the evidence supported the jury's finding that the shipowner was not negligent and was therefore not liable for the death of a longshoreman who fell through an open hatch in a darkened hold where loading and unloading activities were not being conducted at the time. Posner's stylistic strengths in *Plovdba* include his concise and masterful factual and legal analysis, coupled with his penetrating assessment and judgment of human motivation. First, Posner starts his opinion with a simple schematic cross-section diagram of the Yugoslavian ship—the M/V Makarska—where Patrick Huck fell to his death inside a darkened hold.³²² This simple embellishment aids immeasurably to the clarity of his opinion. Second, in the course of one page of the *Federal Reporter*, Judge Posner—referring in his discussion to the cross-sectional diagram of the ship—described the relevant evidence that the jury heard below about the circumstances surrounding Huck's death. A subtle stylistic sample of his fluid factual account is as follows:

Holds 2 through 5 are identical, so far as we can glean from the record. . . . Each has three decks. From top to bottom they are the weather deck, the upper 'tween deck, and the lower 'tween deck. Below the lower 'tween deck is the main cargo area of the hold. Each deck contains a hatch roughly 30 feet across. When all three hatches in a hold are open, cargo can be loaded into (or unloaded from) the main cargo area. Hatchways of the typical maritime type (smaller than regular doorways, and with high thresholds) connect the holds laterally at each deck.³²³

A third stylistic virtue of Posner's *Plovdba* opinion is the succinct, scholarly, and balanced discussion of federal statutory and caselaw governing the ability of longshoremen, injured while working on a ship,

320. 692 F.2d at 1133.

321. 683 F.2d 1022 (7th Cir. 1982).

322. *See id.* at 1023.

323. *Id.* at 1023-24.

to recover damages from the ship owner under principles parallel to traditional tort law.³²⁴

Finally, analogizing the federal admiralty law dealing with injuries to longshoremen to the famous Learned Hand formula in *United States v. Carroll Towing Co.*,³²⁵ Posner undertook an insightful, astute and detailed review of what the jury below could have reasoned in reaching its verdict in favor of the shipowner. A selective portion of his elegant analysis for the court strikes me as unusually alluring and is worthy of full quotation, to wit:

The plaintiff also contends that even if the instructions were satisfactory, the undisputed facts showed negligence by the shipowner as a matter of law. We again use the Hand formula to frame this issue. L, the loss if the accident occurred, was large. There was a 25 foot drop from the upper 'tween deck of hold number 1 to the bottom of the hold, and a fall from that height was very likely to cause serious injury or, as in this case, death. As to B, the burden of precautions, there were various ways the shipowner could have prevented the accident. He could have lit the hold, locked the hatchway leading to it from the weather deck of hold number 2, roped off the open hatch, or placed a sign at the hatchway (though the effectiveness of this last precaution may be doubted). Probably the cheapest way of avoiding the accident, however, would have been for the ship's crew not to open the hatches until all the longshoremen had left the ship. This would have meant either the crew's working after normal working hours, or, if the opening of the hatches was postponed till the following morning, delay in beginning stevedoring operations at the next port of call. We doubt that either alternative would be very costly so we judge B in this case to have been, at most, moderate, and possibly small.

If P, the probability of an accident if the precautions that would avert it were not taken, was high, then it would appear, in light of our discussion of L and B, that the shipowner was negligent in failing to take one of the precautions that we have mentioned. But probably P was low. There was no reason for a longshoreman to reenter a hold after he had completed his work there and moved on to another part of the ship. The plaintiff speculates that Huck may have left a piece of clothing in hold number 1 and gone back to retrieve it. It does not seem very likely that anyone would enter a pitch-black hold to retrieve a glove or a sock or a jacket, when he could easily ask for light. It is far more likely that Huck entered for an illicit purpose. This

324. See *id.* at 1024-27.

325. 159 F.2d 169, 173 (2d Cir. 1947).

would not defeat a recovery if the shipowner were negligent; neither assumption of risk nor contributory negligence is a defense to liability in a negligence action under [the relevant federal statute]. But Huck's motive in entering hold number 1 bears on the probability of the accident and hence on the cost-justified level of precautions by the shipowner. Unless it is common for longshoremen to try to pilfer from darkened holds—and it was the plaintiff's burden to show that it is—the shipowner would have no reason to think it so likely that a longshoreman would be in a darkened hold as to require precautions against his falling through an open hatch.

Moreover, the relevant probability, so far as the Hand formula is concerned, is not the probability that a longshoreman would enter a darkened hold but the probability that he would fall into an open hatch in such a hold. The probability was small. The darkness was as effective a warning of danger as a sign would have been. Any longshoreman would know that there was a hatch on the floor and he could not rationally assume that it was closed. Only a reckless person would walk about in the hold in these circumstances, especially if he had no flashlight; Huck had none. There are reckless people as there are dishonest people; but the plaintiff did not try to prove that there are so many reckless dishonest longshoremen as to require the precautions that the defendant in this case would have had to take to avert injury to them.

We do not know whether Huck was aware of the custom of opening the hatches after the longshoremen left the hold, and for the reasons just suggested it is not critical whether he was or not. But probably he was. His body was found well forward of where he would have fallen had he walked straight into the hold. No doubt he was trying to skirt what he knew to be an open hatch. The shipowner was not required to anticipate that a longshoreman knowing of the open shaft would not be able to avoid it; this was possible—happened—but the probability was too remote to warrant precautions beyond the implicit warning of darkness itself.

Another factor bearing on the probability of an accident is that Huck was under the general supervision of the stevedore company that employed him. Even if the defendant should have regarded Huck as no better than a sheep wandering about the ship with no rational concern for his own safety, it was entitled to regard the stevedore as his principal shepherd. The stevedore had a work rule forbidding longshoremen to be anywhere on the ship except where stevedoring operations were actually in progress. The shipowner was entitled to rely on the stevedore to enforce this rule, if not 100 percent at least enough to make it

highly improbable, in light of the other circumstances that we have discussed, that one of the longshoremen would stray away from the rest and fall into a darkened hold.³²⁶

2. Posner's Ugly Opinions

Of the nearly five dozen court opinions authored by Judge Posner during the latter part of 1982, one opinion strikes me, from a holistic perspective, as substantially stylistically ugly.³²⁷

a. "Professor" Posner Goes Bonkers

In probably the most unusual stylistic court opinion written during his entire 1981-82 rookie season on the Seventh Circuit, Posner seemingly forgot that his daytime job had shifted from being a law professor to being a federal appellate judge. By way of an overarching preliminary comment, the medical antitrust case against a private medical association, *Marrese v. American Academy of Orthopaedic Surgeons*,³²⁸ came to be decided by an unusual panel of three Seventh Circuit Judges in an odd way. The panel of three included Judge Posner—the author of the court opinion—Circuit Judge Pell and retired Supreme Court Justice Potter Stewart.³²⁹ Posner was a fill-in for circuit Judge Sprecher, who “was originally the third member of the panel, but [whose] untimely death prevented his participation in the decision of this case.”³³⁰ The ever intrepid “Judge Posner took his place and . . . read the briefs and pertinent portions of the record and . . . listened to the tape recording of the oral argument”³³¹ in the case.

The remarkable opinion of the panel, written by Judge Posner, consumes over ten pages in the *Federal Reporter*—an unusually long Posnerian opinion, over twice his average opinion length.³³² While it exhibits Posner's trademark intellectual dexterity and brilliance on a

326. 683 F.2d at 1027-28 (citations omitted).

327. See *supra* note 263 (where I briefly describe certain rather minor unattractive features of Posner's court opinions during this timeframe).

328. 692 F.2d 1083 (7th Cir. 1982).

329. See *id.* at 1086.

330. See *id.* at 1086, n* (the footnote was inserted prior to the court's opinion to signify the change of panel members and was not denoted by a number).

331. *Id.*

332. See DOMNARSKI, *supra* note 14, at 143-44. In a random sample of Posner opinions over approximately the first decade of his tenure as a federal appellate judge Domnarski concluded that “[e]ach Posner opinion averaged 4.14 pages [and] is approximately three thousand one hundred words long.” *Id.* at 144.

wide assortment of topics, it is aesthetically disagreeable for three principal reasons. First, Judge Posner, like a precocious, but obnoxious, child showing off for his parents' friends at a cocktail party in his home, is oblivious to what, aesthetically, might be called a *sense of occasion* and, legally, is referred to as the procedural context of the case. As persuasively expressed in this regard by Justice Stewart in his dissent:

In this case our mission is no more than to review a criminal contempt citation [made by the court on the defendant medical association] for refusing to comply with a discovery order [by the district court judge, under a protective order, to produce ten years' worth of correspondence and other documents relating to plaintiffs' application for membership in the association and other membership denials]. Nonetheless, the majority opinion wrestles with difficult questions concerning, first, the doctrine of *res judicata*, and, second, the application of the Sherman Act to a denial of a membership in a professional organization.³³³

Second, Posner's opinion violates, without good reason, the cardinal jurisdictional convention and collegial rule of judicial etiquette, that appellate courts should not pontificate on abstract questions of law based on speculation of what the relevant facts of a case might, or might not, be. In stylistic terms we might say that written appellate opinions should avoid engaging in too much "gossiping".³³⁴ Again, Justice Stewart's dissent in the case aptly expresses this criticism of Posner's opinion:

It forges new ground, despite the absence of a factual record in this case and despite the existence of contrary precedent in other Circuits. Because I believe that neither of these questions is properly presented for review by this Court, that the substance of the discussion concerning the doctrine of *res judicata* is extremely dubious, and that the contempt citation was proper, I respectfully dissent.³³⁵

Finally—and related to the first criticism³³⁶—while Posner's opinion in *Marrese*, reversing the contempt citation against the medical association for refusal to conduct ordered discovery is scholarly, and exhibits certain literary flourishes, such as his references to Aristotle and

333. *Marrese*, 692 F.2d at 1096 (Stewart, J., dissenting).

334. The definition of "gossip" is "rumor or report of an intimate nature;" "a chatty talk." COLLEGIATE DICTIONARY 504 (Merriam-Webster, Inc. ed., 10th ed. 1998).

335. 692 F.2d at 1096 (Stewart, J., dissenting).

336. See *supra* note 332 and accompanying text.

de Tocqueville³³⁷ and to Don Quixote,³³⁸ on balance, his gingerbread embellishments are stylistically out of place and, therefore, like "pigs in a parlor."

D. Free Agent: Posner's Dissenting, Concurring and Chamber Opinions

Judge Posner also wrote a handful of other opinions during his 1981-82 rookie season: one "in chambers" opinion,³³⁹ two concurring opinions,³⁴⁰ and six dissenting opinions.³⁴¹ Brief stylistic comments are in order for each of these three types of separate opinions.

1. In Chambers

Taking the opportunity to create precedent and correct what he viewed as past judicial "laxity" and lawyerly frivolity in filing motions for extensions of time for the filing of appellate briefs, Posner wrote a one page opinion in *Connecticut General Life Insurance Co. v. Chicago Title & Trust Co.*³⁴² on the topic. Denying the motions in the case, Judge Posner was chiefly concerned about the integrity of the Seventh Circuit Rules and the waste of judicial resources.³⁴³ Yet, he chose to drive these judicial policy considerations home by quoting from Shakespeare's classic play on law and justice, *Measure for Measure*: "[O]ur decrees,/Dead to infliction, to themselves are dead,/And liberty plucks justice by the nose."³⁴⁴

337. See 692 F.2d at 1089 ("[o]ne does not have to raise the ghosts of Aristotle and de Toqueville to be reminded that voluntary associations are important to many people, Americans in particular, and that voluntary professional associations are important to American professionals").

338. *Id.* (quoting an epigram from a district court opinion, "[f]ederal courts do not stage academic tournaments merely for Don Quixotes to practice knighthood") (internal quotation marks omitted).

339. See *Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co.*, 690 F.2d 115 (7th Cir. 1982).

340. See *United States v. Franzen*, 676 F.2d 261, 267 (7th Cir. 1982); *Trecker v. Scag*, 679 F.2d 703, 710 (7th Cir. 1982).

341. See *United States v. Bd. of Sch. Comm'rs*, 677 F.2d 1185, 1190 (7th Cir. 1982); *United States v. Anton*, 683 F.2d 1011, 1019 (7th Cir. 1982); *Sur v. Glidden-Durkee, Div. of S.C.M. Corp.*, 681 F.2d 490, 499 (7th Cir. 1982); *Brotherhood of R.R. Signalmen v. Louisville & Nashville R.R.*, 688 F.2d 535, 545 (7th Cir. 1982); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir. 1982).

342. See 690 F.2d at 115-16.

343. See *id.* at 116.

344. *Id.* (quoting WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act I, sc. iii).

2. Concurring Opinions³⁴⁵

In a habeas corpus petition appeal, *United States v. Franzen*,³⁴⁶ Judge Posner filed an unusual concurring opinion, joining in the reversal of the district court's dismissal of a state prisoner's petition for habeas corpus.³⁴⁷ According to Posner, he went to the trouble to write his concurrence "in the hope that Congress will consider reforms in the habeas corpus statute."³⁴⁸ As a matter of style, federal judges rarely write such gratuitous law and policy opinions. On one level, Posner could be criticized for, again, trying too hard to look smart and trying to impress his peers. *Query*, whether he also had in mind the notion of trying to impress President Reagan to consider appointing Posner to the next available vacancy on the High Court.³⁴⁹ On another level, however, Posner's style in broaching a legal-policy subject that he, in good faith, might have thought Congress (or a Committee or Subcommittee of Congress) might be interested in addressing was judicious, scholarly and frank. Indeed, he posited legitimate reasons why Congress might be interested in reforming federal habeas corpus procedure including "principles both of federalism and of rational criminal procedure," "the responsibility and morale of state judges," the "reasonable finality to criminal proceedings and . . . the legitimacy of the criminal-justice system," imposition "on the time of our busy district judges," arousal of "false hopes in state prisoners" and the "accuracy of constitutional determinations."³⁵⁰ Moreover, Judge Posner's concurring opinion provided an insightful and concise historical analysis of habeas corpus proceedings in the Nation.³⁵¹

In the other concurring opinion written by Judge Posner during 1981-82,³⁵² he again filed his concurrence to plead normative policy matters to Congress—this time of federal securities law—and to, no doubt, attempt to impress conservative allies to push his appointment for a seat on the Supreme Court.³⁵³ Posner, inappropriately and imprudently in my judgment, implicitly takes the Supreme Court to task for its past

345. In comparison with the general discussion of judicial opinion style focusing on opinions written for a majority of an appellate court, there is a body of separate, and generally older, literature on concurring and dissenting judicial opinion style. See, for example, the materials collected in APPELLATE JUDICIAL OPINIONS, *supra* note 168, at 203-14.

346. 676 F.2d 261 (7th Cir. 1982).

347. *See id.* at 267.

348. *Id.*

349. *See generally supra* note 26 and accompanying text.

350. 676 F.2d at 268.

351. *See id.*

352. *See Trecker v. Scag*, 679 F.2d 703, 710 (7th Cir. 1982).

353. *Cf. supra* notes 345-49 and accompanying text..

jurisprudence in this area³⁵⁴ and even has the gall to injudiciously comment on a pending grant of certiorari in the High Court.³⁵⁵ Moreover, on the subject of what he sarcastically refers to earlier in his opinion as "the unintended federalization of corporation law by Rule 10(b)-5,"³⁵⁶ he takes the low road of pure judicial subjectivity and pandering by quibbling with what he thought "Congress intended to happen when it enacted section 10(b) in 1934,"³⁵⁷ because of his subjective view that the case before the Seventh Circuit panel was a mere "garden-variety squabble among shareholders in a closely held corporation, which could not even be maintained as a diversity action because of the lack of complete diversity among the parties."³⁵⁸

3. Dissenting Opinions

What about Judge Posner's dissenting opinion style?³⁵⁹ In examining some points of Posner's dissenting opinions during 1981-82, it is illuminating to start with the truism of former Justice Harry A. Blackmun that "[i]t is much easier to write a biting dissent than a constructive majority opinion."³⁶⁰ While a complete analysis of the judicial opinion style, both comparative and normative, of Judge Posner's dissenting opinions is a subject worthy of a separate law review article, the following stylistic comments, addressed to the most striking features of his six dissenting opinions during 1981-82, indubitably belong in this article.

First, in his first-ever dissenting opinion as a judge, in the Indianapolis school desegregation case of *United States v. Board of School Comm'rs*,³⁶¹ Posner exhibited what might be called an outwardly respectful tone to his colleagues in the majority, with a subtle slam of outrage at his brethren's lack of economic and practical common sense. Thus, while Judge Posner begins his dissent using language of obeisance—"[w]ith all due regard for the forcefully articulated contrary view of my brethren"³⁶²—the essence of his contrarian opinion uses words that convey ridicule of the majority—"[t]hese are fascinating questions for economists, [dealing with where a defendant will "get the money" to

354. See 679 F.2d at 710-11.

355. See *id.* at 711 (referring to *Herman & MacLean v. Huddleston*, 102 S. Ct. 1766 (1982)).

356. *Id.*

357. *Id.* at 712.

358. *Id.* at 711.

359. See *supra* note 345.

360. APPELLATE JUDICIAL OPINIONS, *supra* note 168, at 203 (quoting unacknowledged source).

361. 677 F.2d 1185 (7th Cir. 1982).

362. *Id.* at 1190.

pay for its legal liability] but too difficult and tangential to engage the attention of courts."³⁶³ Yet, at least at the end of his dissenting opinion, Judge Posner offers up a succinct, helpful and non-pejorative alternative remedial approach that has the virtue of acting as a beacon for future federal judges who might be called upon to fashion equitable relief in school desegregation cases. Posner wrote:

[R]ather than get into the tangled and recriminatory business of who shall pay for this court-ordered busing, we should say: "This litigation ended, at long last, when the district court's busing order was upheld by this court and certiorari was denied. Let the State of Indiana worry about who shall bear the costs of complying with the order. It is not a matter for the federal courts unless the state should devise a method of financing that discriminates against the black people who are the intended beneficiaries of the order. Other than in a purely technical sense there is no federal question before us today."³⁶⁴

Judge Posner's second dissenting opinion, in the case of *United States v. Anton*,³⁶⁵ was in an immigration case involving the interpretation of a federal statute that made it a crime for a once-deported alien to re-enter the United States "unless . . . the Attorney General has expressly consented to such alien's reapplying for admission."³⁶⁶ Posner's dissenting judicial opinion style in this case was uniformly respectful and measured. Moreover, during the entire course of his dissent, Posner elegantly and persuasively deployed traditional techniques of statutory construction, such as textual analysis of the language of the legislation,³⁶⁷ examination of the possible purposes of Congress in passing the law,³⁶⁸

363. *Id.* at 1192. Other language of ridicule could be found in Posner's dissent: "[a]ll this is a vast oversimplification," and "I am thus willing to indulge the heroic assumption" *Id.*

364. *Id.* at 1194.

365. 683 F.2d 1011 (7th Cir. 1982).

366. *Id.* at 1012 (quoting 8 U.S.C. § 1326(a)(2)(A) (1994)).

367. *See id.* at 1019.

368. *See id.* at 1019-20. Posner's use of the analogy of statutory rape to probe the possible purposes of Congress in passing the Alien Re-entry Felony Statute is striking. As reasoned by Posner:

A statute that does not allow a defense of reasonable mistake as to the girl's age will deter some men from having intercourse with young-looking girls who in fact are over the age of consent. Socially permitted activity is thereby deterred; but since there is no strongly felt social interest in encouraging the activity, overdeterrence is seen as a small price to pay for having a statute that is easier to enforce than it would be if a defense—inevitably rather porous—of reasonable mistake were allowed. Similarly, Congress would not I think have thought it a high price to pay for a strict prohibition against the illegal return of previously deported aliens that some deported aliens who would have gotten the Attorney General's express consent to reenter this country if they had applied for it would be discouraged from applying because of the consequences of making a mistake.

Id. at 1020.

the "historical evolution" and legislative history of the deportation statute,³⁶⁹ policy considerations underlying various plausible interpretations,³⁷⁰ and the force of the precedent of other courts' interpretation of the specific statutory issue at bar.³⁷¹

Despite his implicit disclaimer to his third dissenting opinion in *Sur v. Glidden-Durkee, Division of S.C.M. Corp.*,³⁷² that he did not want to "cry wolf" or "utter prophecies of doom that become self-fulfilling by drawing attention to and then exaggerating the scope of the majority opinion,"³⁷³ that is precisely what Judge Posner did in his overtly vitriolic dissent. Given Posner's demonstrated sense of proportionality in being mindful of assessing the costs and benefits of pursuing a particular course of conduct in a specific context coupled with his usual refined sensitivity to the equities of human foibles, it is remarkable that he bothered to go to the trouble of writing such a vigorous dissent, which objected to the majority's reversal of a summary judgement against the father of a child who was born with severe and costly birth defects. The father's previous employer's insurance policy would have substantially covered the medical expenses of the father's child. The legal issue at bar was one of Indiana law in a diversity case. Here, employers and medical benefit insurers were in a better position than the departing employer to avoid the costs of misunderstanding health insurance policy provisions and conversion options.

In Judge Posner's fourth dissenting opinion, *Brotherhood of Railroad Signalmen v. Louisville & Nashville Rail-Road*,³⁷⁴ his concern for the proper allocation of legal responsibilities between federal courts and federal administrative boards under the Railroad Labor Act was well-taken,³⁷⁵ however, the way that he presented his thoughts that the court of appeals should "direct the district court to remand this case to the board for further interpretation—provided, of course, that the district court has the power to remand"³⁷⁶ is confusing, rambling, unstructured and ultimately unhelpful.³⁷⁷

Judge Posner's fifth dissenting opinion in *McKeever v. Israel*³⁷⁸—a prisoner's civil rights appeal under 42 U.S.C. § 1983—comes off as shrill

369. *Id.* at 1020-21.

370. *See id.* at 1021.

371. *See id.* at 1021-22.

372. 681 F.2d 490 (7th Cir. 1982).

373. *Id.* at 501.

374. 688 F.2d 535 (7th Cir. 1982).

375. *See id.* at 545 (discussing the Federal Railroad Labor Act, 45 U.S.C. § 153 First (m)).

376. *Id.* at 547.

377. *See id.*

378. 689 F.2d 1315 (7th Cir. 1982).

and unmeasured.³⁷⁹ His harmless error objection to the majority's reversal of a judgment on the merits in favor of the Wisconsin prison officials, and remand of the case back to the district court for appointment of counsel, is rational and appropriate.³⁸⁰ McKeever's claim of constitutional infringement by his jailers, in regulating the amount of personal mail that he could take with him when he left the confines of the prison for various court hearings, seems to have been dubious. Further, the panel majority's remand order requiring appointed counsel to brief and argue issues that had been resolved against the prisoner at trial appeared to have imposed unreasonable costs on the state officials as well as the practicing bar.³⁸¹ But, Judge Posner's rhetoric and use of inflammatory broadsides was bad form, and an exercise in overkill and judicial whining³⁸² in a type of dissent that could be viewed by outside observers as a type of political pandering to conservative movers and shakers in a position to suggest the elevation of Judge Posner to the Supreme Court.³⁸³

Before we leave the matter of the style of the dissenting opinions of Judge Posner during 1981-82, his dissent from denial of rehearing en banc in *Allison v. Liberty Savings* should be briefly mentioned.³⁸⁴ Posner was not a member of the panel that decided *Allison*. Yet, he chose to make the unusual gesture of writing a substantial opinion disagreeing with the vote of the entire Seventh Circuit to deny rehearing en banc.³⁸⁵ First, Point one: Judge Posner acknowledged that the panel opinion, which interpreted the federal Real Estate Settlement Procedures Act (RESPA) as precluding a private cause of action by a borrower against a lender claiming excessive escrow deposit requirements was "lucid and well reasoned" and "reache[d] an attractive result,"³⁸⁶ he observed that he "disagree[d] with the decision, and believe[d] that the case should be reheard en banc,"³⁸⁷ because "the panel's opinion both sets forth an

379. See *id.* at 1323-25.

380. See *id.* at 1324.

381. See *id.* at 1324-25.

382. See, e.g., *id.* at 1323 ("However dubious . . . it might seem . . . to allow lawfully imprisoned convicts to spend their time bringing damage suits against their jailers, so that instead of reflecting on the wrongs they have done to society our convicts . . . prosecute an endless series of mostly imaginary grievances against society, this . . . is too well established for me to question."); *id.* at 1324 ("This seems rather a routine prisoner's rights case: a scatter shot of implausible charges."); and *id.* at 1325 ("Perhaps this apocalypse is already upon us. Our criminal prosecutions are becoming—to use an ugly but apt word—multiphasic.").

383. Cf. *supra* note 26 and accompanying text.

384. 695 F.2d 1086, 1091 (7th Cir. 1982).

385. See *id.*

386. *Id.*

387. *Id.*

approach potentially of general application to deciding when federal statutes may be enforced by private damage actions and creates a conflict with another circuit."³⁸⁸ Second, while Judge Posner's motive may have been to get the Supreme Court interested in ultimately rethinking its private cause of action by statutory implication jurisprudence, his style of doing so was attractive. This is so because Posner makes insightful and plausible arguments of statutory construction in the course of his opinion, while examining, in a scholarly fashion, matters of statutory remedies to carry out the full purposes of Congress.³⁸⁹

V. CONCLUSION

Appellate judicial opinion style can be conceptualized as a subject that addresses different kinds or manners or ways of writing the rationales for court judgments and orders. Two major epistemological subdivisions exist: (1) descriptive judicial opinion style studies—concerned with canvassing and assessing types of judicial opinions (for example, long or short; scholarly or barebones; policy-driven or precedent-based; literary or non-literary; beautiful or ugly); (2) normative judicial opinion style studies (concerned with articulating the ideal way or ways that appellate judges should write their opinions given such jurisprudential concerns as separation of powers, the role of the judiciary, the purpose of judge-made law, the value of judge-interpreted law, and the general accessibility of judicial opinions in a free society.

Relatively little systematic thought has been given to date on the subject of appellate judicial opinion style. The 1995 Chicago Law Review Colloquium³⁹⁰ is the most prominent recent scholarly efflorescence on the subject.³⁹¹ The Chicago Law Review Colloquium brought together the most prominent scholars in the field of literary studies of judicial opinions—Professors Nussbaum, Schauer and White—and two of the Nation's most thoughtful and respected federal appellate opinion stylists—Circuit Judges Posner and Wald. In an assortment of incisive and engaging articles the Colloquium participants contributed to furthering both descriptive judicial opinion style studies as well as normative judicial opinion style studies. Only a few authors,

388. *Id.*

389. *See id.* at 1092.

390. *See supra* notes 26-113 and accompanying text.

391. For a sampling of the literature on appellate judicial opinion style antedating the 1995 Chicago Law Review Colloquium, see *supra* notes 155-171 and accompanying text.

however, have bothered to systematically study the judicial opinion styles of specific appellate jurists.³⁹²

Judge, professor, prolific author, popular speaker and, now, settlement "Czar" of the Microsoft antitrust case, Richard A. Posner is a worthy subject of study as a theorist and practitioner of appellate judicial opinion style for four reasons. First, he is probably the most famous and influential non-Supreme Court jurist in the United States.³⁹³ Second, given his vast, diversified and interesting scholarly input and his background, he is unquestionably one of the brightest persons currently sitting on any appellate court in the world. Third, unlike the vast majority of appellate judges in the United States, Posner actually writes his own opinions. He uses his law clerks solely for research.³⁹⁴ Finally, Posner is an omnivorous reader who is inclined to reflect his reading in his opinions.³⁹⁵

392. For a discussion of the insights contained in one of the best books on the subject of appellate judicial opinion style, which examines a variety of styles of different jurists, see *supra* notes 114 to 154 and notes 172 to 186 and accompanying text. See also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990) (a pioneering study in both judicial reputation and the literary dimensions of judicial writing, collecting and discussing some of the prominent literature on both subjects).

393. See generally DOMNARSKI, *supra* note 14, at 145.

394. As pointed out by William Domnarski:

[Judge Posner] is one of only three or four federal judges who writes every word of every opinion. And while we know that judges and justices in the past, such as Holmes and Hand, wrote their own opinions, no other judge has written his opinions in Posner's fashion, although one wonders what Holmes, with his promptness and speed, would have done if word processing technology had been available to him.

At oral argument Posner asks pointed questions designed to isolate the key issues and occasionally makes notes to be used later. The panel votes on the cases and then opinions are assigned by the presiding judge. Sitting on a panel of three, hearing six appeals during a day of oral argument, Posner is assigned to write two opinions for the panel, as are the other two judges sitting that day. His practice, as astonishing as it sounds, is to write complete drafts for both opinions that evening. That he also writes more opinions per year than any federal judge in the country by a sizeable margin makes his writing ability even more astonishing. He writes not in longhand but on a . . . computer. He has three of these—one for his office, one for his home in Hyde Park, and one for his vacation house. Going through the first draft, he indicates where more research has to be done, although he is able to provide most of the research and citations from cases he has already written and which are readily available. Sometimes a first draft will go to the printer virtually unchanged. When more work is called for, he directs his law clerks to research points of law to provide authority for various propositions. They assemble the research on a library cart for his convenience. The clerks also are encouraged to make comments and suggestions on the draft. He uses two law clerks, although most circuit court judges use three. With the additional research he or his law clerks have done, Posner then revises the opinion on his computer until he has what he wants. He writes every word of his opinions and has read all of the authorities cited in them.

Id. at 122-23.

395. See generally *id.* at 147.

He has eclectic reading taste and is as likely to move through all of Joyce as he is to read spy novels by John Le Carré or books of Russian history. He rereads much of Shakespeare each

With the exception of William Domnarski's excellent book, *In the Opinion of the Court*, which devotes a long chapter to Judge Posner's opinion style,³⁹⁶ there is little extant scholarly discussion of Posner's judicial opinion style. This article is an attempt to start the scholarly process of providing more thought and attention to following up Domnarski's seminal work. I have examined what I have referred to as Posner's "rookie season" as a federal appellate judge—a little over one full year from the time that he assumed his office in late 1981 through the end of 1982.

Research of Judge Posner's rookie season lead me to several conclusions. First, Posner burst onto the scene as a newly minted federal appellate judge with an extraordinary amount of intellectual energy that he has continued to exhibit for nearly two decades. Second, Posner writes his opinions in what he has himself labeled an "impure style": "explaining to a hypothetical audience of laypersons why the case is being decided the way that it is."³⁹⁷ Posner eschews what he calls the prevailing style of appellate judicial opinion writing—the "pure" style that is "solemn, highly polished and artificial—far removed from the tone of conversation—impersonal . . . and predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion."³⁹⁸ Third, from the very start of his service as a federal appellate judge, Posner wrote several "beautiful" opinions during 1981-82 for his panel of the Seventh Circuit, which opinions exhibited such positive stylistic qualities as context awareness of legal issues of first impression, penetrating policy-based analysis, extraordinary narrative skill, intense doctrinal scrutiny, illuminating economic insights, and miscellaneous stylistic virtues (by way of illustration—use of analogy, use of epigrams, use of creative and helpful hypotheticals, use of simile, deployment of vivid and colorful slang).³⁹⁹ Fourth, during his rookie season on the bench, Judge Posner's opinion style also reflected occasional and isolated "ugly" opinions, or portions thereof, which exhibited such negative stylistic qualities as overly-harsh criticism of lower court judges, arguably free-wheeling, speculative and untethered law and economics analyses, apparent egotism, possible presumptuous questioning of settled legal doctrine, sloppy and imprecise use of language, over-intellectualization, intellectual grandstanding, and

year and reads *The American Scholar*, *Commentary*, *The Times Literary Supplement*, the *New York Review of Books*, *The Economist*, *Raritan*, *The Public Interest*, and the *New Republic* regularly.

Id.

396. See *id.* at 116-55 (Chapter 6 of his book called "Closing the Circle").

397. Posner, *supra* note 16, at 1430; see *supra* note 58 and accompanying text.

398. *Id.* at 1429-30. See *supra* note 57 and accompanying text.

399. See *supra* notes 180-254, 261-62, 268-326 and accompanying text.

short-shrift treatment of the facts of the case.⁴⁰⁰ Fifth, given the few instances of Judge Posner's in-chambers, concurring and dissenting opinions during his rookie season, his judicial opinion style is generally more uneven than his overwhelmingly attractive style of writing majority opinions for the court during this same timeframe. In this regard, Posner's two concurring opinions during 1981-82—although not without stylistic virtues—largely exhibit unattractive stylistic attributes including gratuitous discussions of law and policy; inappropriate criticism of the Supreme Court, imprudent commentary on a pending certiorari petition, political pandering, and intellectual exhibitionism.⁴⁰¹ Sixth, the handful of dissenting opinions written by Judge Posner during 1981-82 show a mix of relatively attractive stylistic qualities—such as an exposition of a non-pejorative alternative remedial approach to deciding the case, and astute contrarian probing of the purposes, history and language of the federal statute at issue—with relatively unattractive stylistics, such as overtly vitriolic rhetoric, failure to exercise a sense of proportionality and equitable sensitivity, confusing, rambling, and unstructured digressions on the role of federal courts *vis-a-vis* federal administrative boards, argumentative overkill and whining, and political pandering).⁴⁰²

In closing, I wish to emphasize that appellate judicial opinion style matters. It matters because, from a practical standpoint, good substantive legal reasoning is inextricably intertwined with attractive style. It matters from a purely aesthetic perspective, because published appellate judicial opinions are a separate genre of literature and deserve to be crafted in ways that create beauty. In this regard, while legal philosophers have given some attention to aesthetic theory and the law through isolated discussions the literary "poetics" of judicial opinions—like those discussed at the outset of this article⁴⁰³—and glancing treatment of aesthetics theory and the law through delineation of matters of "coherence" and the law,⁴⁰⁴ much more remains to be done. Lawyers, judges, scholars and citizens need richer, more

400. See *supra* notes 255-260, 263, 327-338 and accompanying text.

401. See *supra* notes 345-58 and accompanying text.

402. See *supra* notes 359-89 and accompanying text.

403. See *supra* notes 82-113 and accompanying text.

404. See, e.g., Ken Kress, *Coherence* in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533 (Dennis Patterson ed., 1996).

An idea or theory is coherent if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single, unified viewpoint. An idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another.

Id.

particularistic, more nuanced, more comparative, more historically situated assessments of the nature and practice of appellate judicial opinion style. I offer this article as a modest start along that path with regard to one very prominent and respected appellate judge.

Judge Richard A. Posner's appellate judicial opinion style during his rookie season on the federal appellate bench, by and large, is uniquely beautiful, with isolated pockets of ugliness. At their core, Posner's judicial opinions exhibit what might be called an *essayistic style*—a style generally described by Edward Hoagland as “caroming thoughts not merely in order to convey a certain packet of information, but with a special edge or bounce of personal character in a kind of public letter.”⁴⁰⁵

One might call Posner's “special edge” in his first batch of judicial opinions as possessing an intangible, “sexy style,” a way of legal reasoning that “can be serendipitous or domestic, satire or testimony, tongue-in-cheek or a wail of grief” that is, at its essence,

[m]ulched perhaps in its own contradictions, it promises no sure objectivity, just the condiment of opinion on a base of observation, and sometimes such leaps of illogic or superlogic that they may work a bit like magic realism in a novel: namely, to stimulate the mind's own processes in a murky and incongruous world.⁴⁰⁶

Posner's legal reasoning exhibits, in the words of Professor Robert S. Summers “the capacity to understand complex and subtle issues and the capacity to bring reason to bear in articulate balanced ways.”⁴⁰⁷

405. Edward Hoagland, *Writers Afoot: Essayists as Infantry*, 68 AM. SCHOLAR, Summer 1999, at 103.

406. *Id.*

407. Robert S. Summers, *Law as More Than a Livelihood*, 26 CORNELL L. FORUM 13 (1999).